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SORTING OUT *PRIGG v. PENNSYLVANIA*

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*Prigg v. Pennsylvania*¹ was the first case that the United States Supreme Court heard under the Fugitive Slave Clause of the Constitution² and the 1793 Act³ which was adopted to implement that clause. In his "Opinion of the Court," Justice Story upheld the Fugitive Slave Act, struck down Pennsylvania's 1826 Personal Liberty Law,⁴ and offered a complex interpretation of the Fugitive Slave Clause. Since

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1. 41 U.S. (16 Pet.) 539 (1842).

2. U.S. CONST. art. IV, § 2, cl. 3. The Clause was technically known as the "Fugitives From Labour" clause because of the euphemistic language used by the Constitutional Convention. As Connecticut's Roger Sherman argued in the Convention, the term slave was "not pleasing to some people." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 415 (Max Farrand ed., 1966) [hereinafter RECORDS]. However, since 1787, it has commonly been referred to as the Fugitive Slave Clause.

3. An Act respecting fugitives from justice, and persons escaping from the service of their masters, ch. VII, 1 Stat. 302 (1793). This act had two distinct parts. Sections one and two of the Act dealt with fugitives from justice; sections three and four dealt with fugitive slaves. In this Article I shall refer to the entire Act as the Act of 1793. When discussing only the last two sections of the Act, dealing with fugitive slaves, I will call the act the Fugitive Slave Act. This comports with Nineteenth Century usage. Lawyers, politicians, and judges usually referred to the act as "the fugitive slave act" or "fugitive slave law" when talking about the fugitive slave provisions of the larger act.

4. An Act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent Kidnapping, ch. L, 1826 Pa. Laws 150 [hereinafter Pennsylvania Personal Liberty Law]. For a discussion of the passage of the law, see William R. Leslie, *The Pennsylvania Fugitive Slave Act of 1826*, 13 J.S. HIST. 429 (1952), reprinted in 6 ARTICLES ON AMERICAN SLAVERY: FUGITIVE SLAVES 211 (Paul Finkelman ed., 1989).

1842, lawyers, judges, politicians, and scholars have struggled to understand what the Court actually decided in *Prigg*. Even the Court seemed dissatisfied with and confused by the result.⁵

The confusion begins with the sheer number of opinions—seven in all. While multiple opinions today are commonplace, they were rare in the antebellum period. After Chief Justice John Marshall abolished the practice of *seriatim* opinions, justices rarely wrote separate opinions except to dissent from the result of the case. The vast majority of decisions were unanimous. In 1832, for example, the court decided fifty-five cases. Forty-six were unanimous. Eight cases contained a single dissent.⁶ One case, *Worcester v. Georgia*, contained a dissent and a concurrence.⁷ This exceptional case, like *Prigg*, involved both race relations (Native Americans) and a conflict between state power and federal power. Similarly, in 1842, the Court decided 43 cases, including *Prigg*. Thirty-eight contained only one opinion. In three other cases, there were two opinions.⁸ This contrasts sharply with the seven opinions in *Prigg*. In the entire period from 1801 until 1842 no case had more than seven opinions and only one besides *Prigg* had that many. That case, *Groves v. Slaughter*,⁹ decided a year before *Prigg*, also involved slavery.¹⁰

5. Part of this confusion resulted from Chief Justice Roger Taney's concurring opinion, which inaccurately restates Story's opinion. Statements posthumously attributed to Story by his son further confuse matters.

6. Justice Baldwin dissented in: *Greene v. Neal*, 31 U.S. (6 Pet.) 291 (1832); *Leland v. Wilkinson*, 31 U.S. (6 Pet.) 317 (1832); *Hughes v. Trustee of Clarksville*, 31 U.S. (6 Pet.) 369 (1832); *Carne v. Morris*, 31 U.S. (6 Pet.) 598 (1832); *Kelly v. Jackson*, 31 U.S. (6 Pet.) 622; *Wallace v. Parker*, 31 U.S. (6 Pet.) 680 (1832). Chief Justice Marshall dissented in *Greenleaf's Lessee v. Birth*, 31 U.S. (6 Pet.) 302 (1832). Justice Thompson dissented in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691 (1832).

7. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (McLean, J., concurring) (Baldwin, J., dissenting).

8. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 418 (1842) (Thompson & Baldwin, JJ., dissenting); *Mayor of Mobile v. Hallett*, 41 U.S. (16 Pet.) 261, 263 (1842) (Catron, J., dissenting); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 23 (1842) (Catron, J., concurring in part and dissenting in part).

9. *Groves v. Slaughter*, 40 U.S. (15 Pet.) 229 (1841) (holding that the ban on the importation of slaves for resale found in the Mississippi Constitution of 1832 did not go into effect until Mississippi passed an enforcement statute).

10. There were no cases with six opinions. There were eight cases with five opinions, only three of which contain a dissent. See 1 SUPREME COURT OF THE UNITED STATES, 1789-1980: AN INDEX TO OPINIONS ARRANGED BY JUSTICE 1-122 (Linda A. Blandford & Patricia R. Evans eds., 1983) [hereinafter INDEX TO OPINIONS]. This research cannot be done on LEXIS or Westlaw. LEXIS has incorrectly labeled some concurrences as

The seven opinions in *Prigg* still cause great confusion. There is uncertainty among legal scholars as to the classification of five of them as either concurrences or dissents.¹¹ This confusion is partially a result of the way nineteenth century justices wrote opinions. They did not always indicate where they stood on the outcome of the case. Opinions were not always labeled as a “dissent” or a “concurrence,” or as a hybrid of the two. Justices did not break down their opinions by Roman numerals and letters, and justices did not always indicate whether they agreed or disagreed with specific parts of other opinions.

One 19th century convention in publishing opinions should have tipped-off commentators as to who concurred and who dissented in *Prigg*. Commonly, opinions were published in a standard order: first, the opinion of the court; second, the opinion of the Chief Justice (if he was in the majority); then all other concurring justices, in order of seniority; then dissents, again in order of seniority. In *Prigg*, the order in which the opinions were published, with the year the justice joined the court, is as follows: Joseph Story (1811); Chief Justice Roger B. Taney (1836); Smith Thompson (1823); Henry Baldwin (1830); James M. Wayne (1835); Peter V. Daniel (1841); and John McLean (1829).

All commentators agree that Justice Wayne’s opinion was a concurrence.¹² Had Wayne been the only concurring judge, his opinion would have followed Story’s. Similarly, if all the justices had concurred, McLean’s opinion would not have been last (as the sole dissenter) but would have followed Thompson’s. The rest of the court concurred in the result, the main constitutional points, and most of Story’s reasoning. Thus, the report of the case followed nineteenth century convention with concurring opinions proceeding in order of seniority rather than in order of the extent of concurrence.

dissents and fails to note some separate opinions, which Blandford and Evans call “statements” by the Justices. Westlaw does not allow for a search of dissents and concurrences in this manner.

11. For example, the legal database LEXIS considers the opinions by Chief Justice Taney and Justices Thompson, Daniel, and McLean to be dissents. It fails to even notice Justice Baldwin’s opinion. The more authoritative, but not completely accurate, INDEX TO OPINIONS, *supra* note 10, at 72, 82, 93, 103, 120, categorizes the opinions of Taney, Thompson, Daniel, and McLean as “separate opinions” but refers to Baldwin’s opinion as a “statement.” The only thing both sources are able to agree on—and here they are correct—is that Justice Joseph Story wrote the “Opinion of the Court” and that Justice James Wayne wrote a separate concurrence agreeing with Story on all points. *Id.* at 93.

12. Wayne’s opinion began: “I concur altogether in the opinion of the court, as it has been given by my brother Story.” *Prigg*, 41 U.S. (16 Pet.) at 636.

This article will attempt to clarify the meaning of *Prigg's* various opinions. Eschewing Nineteenth Century practice, I use Roman numerals and subheadings to make the process more clear. Part I contains an overview of *Prigg's* holding and sets forth the Justices' views on the major issues. Part II outlines the facts. Part III examines the Fugitive Slave Act and its validity under the Fugitive Slave Clause of the Constitution. Part IV discusses Justice Story's Opinion. Part V examines the concurring opinions and Justice McLean's dissent. Finally, I argue in Part VI that *Prigg* was not a "triumph of freedom,"¹³ as Story privately claimed, but rather a proslavery opinion written by a Justice personally opposed to slavery but driven by a desire to nationalize all law, including the law of slavery.¹⁴

I. WHO SAID WHAT IN *PRIGG*

In *Prigg*, the Court overturned the conviction of Edward Prigg for kidnapping a black family in violation of Pennsylvania's 1826 Personal Liberty Law.¹⁵ In his opinion, Justice Story reached five major conclusions: that the federal fugitive slave law of 1793 was constitutional; that no state could pass any law that added additional requirements to the federal law or impeded the return of fugitive slaves; that claimants (masters or their agents) had a constitutionally protected common law right of recaption, or "self-help" which allowed a claimant to seize any fugitive slave anywhere and to bring that slave back to the South without complying with the provisions of the Fugitive Slave Act; that a captured fugitive slave was entitled to only a summary proceeding to determine if he was the person described in the papers provided by the claimant; and that state officials should, but could not be required to, enforce the Fugitive Slave Act.¹⁶

13. See *infra* text accompanying note 153.

14. For different interpretations of which particular judges supported Story's opinion on each aspect, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977); Joseph C. Burke, *What Did the Prigg Decision Really Decide?*, 93 PA. MAG. HIST. & BIOGRAPHY 73-85 (1969). All questions concerning Story's supporters on the Court may never be satisfactorily answered. What is more important is that Story's opinion was accepted as the Court's decision at the time it was delivered and that a majority of the Justices supported the Fugitive Slave Act and slavery.

15. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 536, 542 (1842).

16. *Id.* at 536-42.

Justices Catron and McKinley agreed with Story's opinion, although their names do not appear in the case report. Following the traditional antebellum practice of silent concurrence, they wrote no opinion because they completely or substantially agreed with the result. Justice Wayne broke from this tradition when he wrote separately to state his complete agreement. This was an extraordinary occurrence and had never happened before *Prigg*.¹⁷ The fact that Wayne felt the need to write a separate opinion, solely to endorse Story's, illustrates the importance and complexity of this case.

Chief Justice Taney and Justices Thompson, Baldwin, and Daniel all wrote separate opinions concurring in the result. They did not, however, completely agree with the reasoning, or implications of Story's opinion. Chief Justice Taney set the tone for these concurrences at the beginning of his opinion where he stated that the importance of constitutional construction compelled him to discuss where his views differed from Story's.¹⁸

Justice McLean dissented and disagreed with most of Story's reasoning. Unlike the other eight Justices, McLean would have upheld *Prigg*'s conviction and the Pennsylvania law, while rejecting the common law right of recaption.¹⁹

II. THE FACTS OF PRIGG

In 1837, Edward Prigg, Nathan Bemis, and two others travelled to Pennsylvania and seized as fugitive slaves Margaret Morgan and her

17. The only other antebellum case in which it occurred was *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), where all nine Justices wrote opinions. Justice Wayne wrote a separate opinion which began: "Concurring as I do entirely in the opinion of the court, as it has been written and read by the Chief Justice—without any qualification of its reasoning or its conclusion . . ." *Id.* at 454. Similarly, Justice John Campbell began his opinion: "I concur in the judgment pronounced by the Chief Justice . . ." *Id.* at 493. Justice Robert Grier filed a two paragraph opinion, specifically concurring in Justice Samuel Nelson's concurrence. *Id.* at 469.

18. Justice Taney stated:

I concur in the opinion pronounced by the court, that the law of Pennsylvania, under which the plaintiff in error was indicted, is unconstitutional and void; and that the judgment against him must be reversed. But as the questions before us arise upon the construction of the constitution of the United States, and as I do not assent to all the principles contained in the opinion just delivered, it is proper to state the points on which I differ.

Prigg, 41 U.S. (16 Pet.) at 626 (Taney, C.J.)

19. *Id.* at 673.

children. They brought Morgan and her children to Maryland without complying with the requirements of Pennsylvania's Personal Liberty Law regulating the return of fugitive slaves.²⁰ Prigg was subsequently convicted of kidnapping under this act and the Pennsylvania Supreme Court upheld this result. He then appealed to the United States Supreme Court, which overturned his conviction.

Margaret Morgan was the child of people who had been born into slavery. Because of this, Prigg had at least a prima facie claim to Morgan under both the Fugitive Slave Act and Maryland law. Nevertheless, Morgan's status as a slave, and the circumstances of her arrival in Pennsylvania, reveal the problems caused by the Fugitive Slave Clause and the Fugitive Slave Act.²¹

Margaret Morgan's parents had been the slaves of a Maryland master named Ashmore. Although he never formally emancipated them, sometime before 1812 Ashmore allowed Margaret's parents to live as free blacks.²² Thereafter Ashmore, "constantly declared he had set them free."²³ Margaret was born after her parents had been informally set free. Margaret eventually married Jerry Morgan, a free black, and in 1832 they moved just across the Maryland border to Pennsylvania. There they had several children.²⁴ These children were free under Pennsylvania law and were not subject to the Fugitive Slave

20. Pennsylvania Personal Liberty Law, *supra* note 4.

21. For the history of the law's adoption, see Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J.S. HIST. 397-422 (1990) [hereinafter Finkelman, *Kidnapping of John Davis*].

22. Counsel for Pennsylvania stated they were allowed to live as free people "[s]ome thirty years" before the case reached the Supreme Court. THOMAS C. HAMBLY, ARGUMENT OF MR. HAMBLY, OF YORK, (PA.) IN THE CASE OF EDWARD PRIGG 8 (Lucas & Dever 1842), reprinted in 1 FUGITIVE SLAVES AND AMERICAN COURTS: THE PAMPHLET LITERATURE 121, 128 (Paul Finkelman ed., 1988) [hereinafter ARGUMENT OF HAMBLY (with original page numbers and reprint page numbers in parentheses)]. Supreme Court Reporter Richard Peters reproduced most of the arguments of counsel in his official reports and in his pamphlet edition of *Prigg*. However, he did not publish the parts of Hambly's printed argument quoted in this section of this article. It is possible that Peters, Justice Story, and Chief Justice Taney did not want this information in the official report because it greatly undermines the result in the case.

23. ARGUMENT OF HAMBLY, *supra* note 22, at 8 (128).

24. The record in U.S. Reports on the exact number of children she had in Pennsylvania is unclear. According to this report, at least one, and perhaps two, of her children were born in Pennsylvania between 1833 and 1837. Under Pennsylvania law, all people born in that state, including the children of slaves, were free from birth. According to the attorney for Pennsylvania, she had "several other children, which being 'begotten and born' in Pennsylvania, were, according to our laws and the adjudication of our courts, free." *Id.*

Act; they did not fit the constitutional definition of fugitive slaves (persons "escaping into another" state). Margaret's marriage to Jerry Morgan and her subsequent move to Pennsylvania occurred with the apparent acquiescence of Ashmore. Thus, under either Pennsylvania or Maryland law, Margaret might have been legitimately free.²⁵

Around 1836, Ashmore died and his estate passed to his niece, Margaret Ashmore Bemis. In February 1837, Margaret's husband, Nathan S. Bemis, Edward Prigg, and two others went to Pennsylvania to find Morgan and bring her back to Maryland. That month, the four slave-catchers seized Morgan and her children and brought them to Maryland.²⁶ The fact that Bemis and Prigg were immediately able to locate Morgan suggests that she did not see herself as a fugitive slave and had never tried to hide her whereabouts from Ashmore or his niece. That the Morgans lived along the Maryland border also suggests they believed Margaret was a free person.

Bemis and Prigg obtained a warrant from Justice of the Peace Thomas Henderson to apprehend Morgan under Pennsylvania's 1826 law. They seized Morgan, her children, and her husband Jerry Morgan, even though he was indisputably a free person. When Bemis and Prigg brought the Morgans to Justice of the Peace Henderson, he refused to issue the necessary papers allowing for the Morgans' removal from Pennsylvania. He concluded that he lacked jurisdiction in the case under Pennsylvania law.²⁷ Why Henderson reached this conclusion is unclear. He may have determined, on careful examination, that Morgan entered Pennsylvania with the implicit permission of her owner, the late Mr. Ashmore, and thus she was not a fugitive slave. Henderson may also have realized that several of Morgan's children were born in

25. I hope to explore this possibility in a future article. Part of this argument would be based on the Pennsylvania law that a slave became free if her owner allowed her to live in Pennsylvania for more than six months. If Ashmore knew that Margaret was living in Pennsylvania, and allowed her to live there, then it would have been reasonable for a Pennsylvania court to conclude that he intentionally allowed her to become free under Pennsylvania law. On this issue, see PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 46-69 (1981) [hereinafter FINKELMAN, *AN IMPERFECT UNION*].

The circumstances of Morgan and her children underscore the necessity of state laws to protect free blacks who might be enslaved under the color of federal law. But, in recounting the facts of the case, Justice Story ignored this possibility. His desire to write a sweeping nationalistic opinion striking down Pennsylvania's Personal Liberty Law was paramount. He was utterly unconcerned with insuring justice for Margaret Morgan and her free born children.

26. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 556 (1842).

27. ARGUMENT OF HAMBLY, *supra* note 22, at 8 (128).

Pennsylvania and were clearly not fugitive slaves. Similarly, he may have noted that Bemis and Prigg had also seized Jerry Morgan, who was unquestionably free.

Bemis and Prigg then acted on their own. After releasing Jerry Morgan, they took Margaret and her children to Maryland where "they were sold to a negro trader . . . for shipment to the South."²⁸ A Pennsylvania grand jury subsequently indicted the slave-catchers under Pennsylvania's Personal Liberty Law.²⁹ Initially Maryland refused to comply with an extradition requisition from the governor of Pennsylvania. However, negotiations between the two states led to a compromise. Maryland sent Prigg to Pennsylvania for trial after Pennsylvania officials agreed that in the event of a conviction he would not be incarcerated until after the United States Supreme Court had ruled on the constitutionality of the relevant state and federal laws. Pennsylvania also guaranteed an expedited appeals process from the trial court to the state supreme court. Thus, a trial court convicted Prigg of kidnapping, the Pennsylvania Supreme Court affirmed in a pro forma opinion, and Prigg appealed to the United States Supreme Court.

Prigg's attorney, who also represented the state of Maryland,³⁰ argued that: 1) Morgan was a fugitive slave; 2) Prigg had legally seized her, exercising his right under the Constitution and the Fugitive Slave Act; 3) Prigg tried to comply with Pennsylvania's Personal Liberty Law, but was frustrated when the local judge refused to issue a warrant under the law; 4) under these circumstances, Prigg acted on his own, and therefore Pennsylvania could not prosecute him for kidnapping; 5) the Pennsylvania law was in conflict with the federal law and should be struck down.

28. *Id.* at 9 (129). Margaret and her children were sold, shipped south and disappeared from the records. Her husband, Jerry, was killed as he was returning from a visit to the Pennsylvania Governor, while trying to secure the return of his wife and children. *Id.* at 10 (130).

29. The grand jury indicted Prigg and his accomplices Nathan S. Bemis, Jacob Forward, and Stephen Lewis, Jr. Only Prigg was returned to Pennsylvania for trial. *Prigg*, 41 U.S. (16 Pet.) at 543.

30. *Id.* at 558. In his opinion Story noted:

[I]t is fit to say, that the cause has been conducted in the court below, and has been brought here by the co-operation and sanction of both the state of Maryland, and the state of Pennsylvania, in the most friendly and courteous spirit, with a view to have those questions finally disposed of by the adjudication of this court

Id. at 609.

III. THE FUGITIVE SLAVE CLAUSE AND THE FUGITIVE SLAVE ACT

Late in the Constitutional Convention of 1787, South Carolina's Pierce Butler and Charles Pinckney proposed that a provision for the return of fugitive slaves be added to the article requiring the interstate extradition of fugitives from justice. The initial response was hostile. Pennsylvania's James Wilson objected to the extradition of slaves at public expense. Connecticut's Roger Sherman sarcastically observed there was "no more propriety in the public seizing and surrendering of a slave or servant, than a horse." Butler then discreetly withdrew his proposition "in order that some particular provision might be made apart from this article."³¹ A day later, the Convention, with neither debate nor a formal vote, adopted the fugitive slave provision as a separate article of the draft constitution.³² Eventually the two extradition clauses emerged as succeeding paragraphs in Article IV, Section 2 of the Constitution.

The Fugitive Slave Clause was technically known as the "Fugitives From Labour Clause" because of the euphemistic language used by the Convention in the final drafting of the document. The Framers avoided the word "slave" because, as Roger Sherman argued in the Convention, the term slave was "not pleasing to some people."³³ The Framers understood they were writing a Constitution which protected slavery at every turn,³⁴ but realized that openly using the word slave might undermine chances of ratification.

The Fugitive Slave Clause provided that "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."³⁵ The Convention

31. 2 RECORDS, *supra* note 2, at 443. See also SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 246 (James H. Huston ed., 1987) [hereinafter SUPPLEMENT].

32. 2 RECORDS, *supra* note 2, at 453-54; SUPPLEMENT, *supra* note 31, at 246.

33. 2 RECORDS, *supra* note 2, at 415.

34. Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant With Death*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188-225 (Richard Beeman et al. eds., 1987) [hereinafter Finkelman, *Slavery and the Constitutional Convention*]; see also William M. Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 167-84 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

35. U.S. CONST. art. IV, § 2, cl. 3.

delegates never discussed what this clause was supposed to accomplish or how it was to be implemented. However, the placement of the clause in Article IV suggests that the framers expected the clause to be enforced by state authorities. Furthermore, the wording of the clause, when compared to other clauses of that article, suggests that the framers did not envision federal enforcement of this clause.

Nevertheless, in 1793, Congress adopted a statute to implement both the Fugitives from Justice Clause and the Fugitive Slave Clause. Before analyzing that Act, it is necessary to examine the structure of the Constitution, and to consider whether Congress had the right to adopt such legislation.

A. *Constitutional Structure, Congressional Power, and Article IV*

Under modern theories of federal power and constitutional law, Congress would have been able to adopt enforcement legislation for the Fugitive Slave Clause.³⁶ Even in the early nineteenth century, there was precedent for expanding Congressional power beyond the explicit constitutional grants. As Chief Justice John Marshall noted, “the necessary and proper clause does not seem to have been intended to limit the powers Congress would otherwise have had.”³⁷ However, the structure of the Constitution, as well as nineteenth-century notions of Congressional power suggest that Congress may have lacked the power to enact the 1793 law.

The Framers left no record of how they expected the Fugitive Slave Clause to operate. Textually and structurally, it seems that they anticipated some sort of state action to enforce it because the clause is in Article IV, which deals with interstate relations. The clause immediately follows the Criminal Extradition Clause, which directly imposes this obligation on the governors of the states.³⁸ In addition, by using the

36. See Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 *YALE L.J.* 161 (1921).

37. David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 *DUKE L.J.* 695, 702-03 (1983) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411-12 (1819)).

38. The Criminal Extradition Clause states:

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2.

phrase "shall be delivered up" the Fugitive Slave Clause implies some official action.³⁹ The implication is that a state judge or county sheriff would seize "deliver up" the fugitive.

Indeed, the entire structure of the Constitution supports the idea that the Framers contemplated that the states would implement the clause, *without* Congressional action. Although limiting what the states might do, this clause is not in Article I, Section 10, where most other limitations on state power are found. Nor is it elsewhere in Article I, where Congress is granted legislative powers. Thus, structurally, the clause is more like an admonition to the states than a grant of power to Congress.

Of course, Article I is not the only place where the Constitution explicitly grants legislative powers to Congress. Articles II and III contain grants of power.⁴⁰ Article IV also contains specific enumerations of Congressional legislative power. However, these specific grants of power in Article IV strengthen the case against Congressional power over fugitive slave rendition.

1. Grants of Power in Article IV

Article IV consists of four separate sections. Three of these sections explicitly authorize the federal government to act. Only section 2, which contains the Fugitive Slave Clause, lacks such a grant of power.

Article IV, Section 1, the Full Faith and Credit Clause, states that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."⁴¹ Section 3 of Article IV concerns the admission of new states and the regulation of federal territories. Both of these paragraphs contain explicit grants of power to Congress.⁴² Section 4, the Guarantee Clause,

39. *Id.*

40. "The Congress may determine the Time of chusing Electors . . ." *Id.* art. II, § 1, cl. 4; "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President . . ." *Id.* art. II, § 1, cl. 6; "[T]he judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as Congress may from time to time ordain and establish." *Id.* art. III, § 1; "[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." *Id.* art. III, § 2, cl. 2; "[W]hen not committed within any State, the Trial [of crimes] shall be at such Place or Places as the Congress may by Law have directed." *Id.* art. III, § 2, cl. 3.

41. *Id.* art. IV, § 1.

42. "New States may be admitted by the Congress . . ." and "nor any State be formed by the Junction of two or more States or Parts of States, without the Consent . . . of the

preserves "a Republican Form of Government" in the states. This clause does not allocate power to Congress, but rather empowers the United States government to act "on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."⁴³ Given the nature of the power granted by this clause, it is logical to assume that the Framers did not narrowly grant the power to act to Congress. In an emergency—such as a rebellion or invasion—the President might have to act, or a federal court might have to issue an injunction or mandamus. Thus, wisely, the Guarantee Clause gave a general grant of power to the United States.⁴⁴

Unlike the other three sections of Article IV, Section 2 contains neither a general grant of power to the United States government nor any specific grant of power to the legislative or executive branches. This fact implies that the Framers intended Section 2 to be implemented directly by the states. The Framers may have contemplated a right of appeal to the federal courts if the states failed to respect this clause,⁴⁵ but it seems unlikely that the Framers thought Congress itself should directly implement the provisions of this section.

2. The Privileges and Immunities Clause

Section 2, clause 1 is a general statement: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."⁴⁶ During the antebellum period, the national government largely ignored this provision. The only important antebellum discussion of this clause is in *Corfield v. Coryell*.⁴⁷ In that case Supreme Court Justice Bushrod Washington, while on circuit, explained what the clause was designed to protect, but declined to apply it to the facts presented.⁴⁸ In the antebellum period, southern states refused to apply the Privileges and Immunities Clause to free blacks

Congress." *Id.* art. IV, § 3, cl. 1. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." *Id.* art. IV, § 3, cl. 2.

43. *Id.* art. IV, § 4.

44. See generally WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972).

45. However, as the nation learned in 1861 the Supreme Court saw no power to enforce at least one section of this clause. See *infra* notes 60-62 and accompanying text.

46. U.S. CONST. art. IV, § 2, cl. 1.

47. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

48. *Id.* at 549.

from the North,⁴⁹ or to protect visiting white northern dignitaries who came South to protest the treatment of free blacks from their states.⁵⁰ Congress was powerless, politically, if not structurally, to deal with these problems.

The Taney Court expressed similar disinterest in enforcing the Privileges and Immunities Clause against the states,⁵¹ except to hint that it might apply that clause, or some other clause, to protect the rights of masters to travel into free states with their slaves.⁵² Only in the post-Civil War era, and primarily in the modern period, has the Supreme Court breathed some life into the Privilege and Immunities Clause.⁵³

3. Fugitives from Justice Clause

Section 2, clause 2, the Fugitives from Justice Clause, provides that a fleeing criminal "shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed" to the state claiming jurisdiction over him.⁵⁴ The text of this clause implies

49. For a discussion of this problem, see Paul Finkelman, *States Rights North and South in Antebellum America*, in *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* 125-58 (Kermit Hall & James W. Ely, Jr. eds., 1989) [hereinafter Finkelman, *States Rights*]. Supreme Court Justice William Johnson, while riding circuit, attempted to apply this clause to free blacks but local officials ignored his ruling and no branch of the government in Washington backed him up. *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823). *Elkison* dealt with British citizens, but the principle would have applied to free blacks from the North as well.

50. *Elkison*, 8 F. Cas. 493 (1823).

51. See, e.g., *Conner v. Elliott*, 59 U.S. (28 How.) 591 (1855); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586 (1839). For penetrating criticism of these decisions, see Currie, *supra* note 37, at 695, 696-799.

52. Justice Samuel Nelson wrote in his concurring opinion in *Dred Scott v. Sandford*, 60 U.S. (29 How.) 393, 468 (1857) (Nelson, J., concurring):

A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on Business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States

This issue was not directly before the Court, so Justice Nelson correctly refused to confront it. But, he noted: "This question . . . turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it." *Id.* For a discussion of the implications of this, see FINKELMAN, *AN IMPERFECT UNION*, *supra* note 25, at 313-43.

53. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blamstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); see also *United States v. Guest*, 383 U.S. 745, 757 (1966); *Edwards v. California*, 314 U.S. 160 (1941).

54. For the full text of the Clause, see *supra* note 38.

governor-to-governor communication and action. Criminal extradition has always worked in that way.⁵⁵ Nothing in the text of this clause indicates or even implies that Congress may legislate on the subject. Even if Congress has some power to regulate or to standardize the extradition process, the text of the clause clearly places the power to implement it solely in the hands of the state governors.

Even after the passage of the Act of 1793, which regulated interstate extradition and fugitive slave rendition,⁵⁶ the states did not always cooperate with each other in extradition matters. In 1835, Governor William Marcy of New York denied the extradition requisition from the governor of Alabama for Robert G. Williams, the publisher of an antislavery paper. Governor Marcy noted that Williams had never been in Alabama.⁵⁷ On the same grounds, the governor of Illinois refused to extradite an abolitionist charged with sedition in Missouri. Similarly, Massachusetts authorities refused to consider southern complaints about abolitionist authors and printers whose publications ended up in the South. Moreover, in a number of cases, state governors refused to extradite people who had been in the states where they were wanted, but were charged with slavery-related offenses which were not recognized as crimes in the states to which they had fled. For example, Governor William H. Seward of New York refused to extradite to Virginia and Georgia persons accused of helping slaves escape. Seward also refused to sign the extradition papers for a runaway slave charged with theft in Louisiana. New York, of course, recognized theft as a crime, but Governor Seward believed the criminal charge was simply a ruse to obtain extradition of a fugitive slave.⁵⁸ Despite these controversies,

55. However, the Court undermined this governor-to-governor process in *Puerto Rico v. Branstad*, 483 U.S. 219 (1987). See *infra* note 62.

56. See *supra* note 3.

57. William L. Marcy, *Annual Message of the Governor*, in 3 MESSAGES FROM THE GOVERNORS 583 (Charles Z. Lincoln ed., 1909); *Documents Accompanying the Governor's Message. (No. 1)*, in 1 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK (59th Sess. 1836) (Albany, E. Croswell 1836).

58. See Paul Finkelman, *The Protection of Black Rights in Seward's New York*, 34 CIV. WAR HIST. 211-34 (1988) [hereinafter Finkelman, *Seward's New York*]; Paul Finkelman, *States' Rights, Federalism, and Criminal Extradition in Antebellum America: The New York-Virginia Controversy, 1839-1846*, in GERMAN AND AMERICAN CONSTITUTIONAL THOUGHT: CONTEXTS, INTERACTION, AND HISTORICAL REALITIES 293-327 (Hermann Wellenreuther ed., 1990). During this controversy, Virginia retaliated by refusing to extradite a forger to New York.

Maine was involved in a similar controversy over sailors who helped a slave escape from Georgia. See Finkelman, *States Rights*, *supra* note 49.

Congress never reconsidered the criminal extradition aspects of the Act of 1793, in part because southerners feared that a stronger law might ultimately work against them.⁵⁹

The Supreme Court never considered whether states could be compelled to cooperate with extradition requests until *Kentucky v. Dennison*, decided in 1861.⁶⁰ In that case, Governor William Dennison of Ohio refused to extradite a free black, Willis Lago, to Kentucky. Lago had helped a slave escape to Ohio. By the time the Court heard the case a number of states had formally seceded from the Union and others seemed likely to follow them into the new Confederate States of America. The Supreme Court's pro-slavery majority⁶¹ was doubtless sympathetic to Kentucky's plight, but Chief Justice Taney did not want to assert that the national government could force a state governor to act. He certainly did not want to hand such a precedent to Abraham Lincoln, who would take office in a few weeks.

Thus, under the antebellum reading of the criminal extradition clause, Congress had the limited power to set a standard for the *form* of the extradition papers, but all branches of the national government were powerless to force a state governor to act. In subsequent years, states relied on *Dennison* to protect racial minorities and political dissidents from oppression by individual states.⁶²

The history discussed above shows the extent to which governors on both sides of the Mason-Dixon line refused to extradite fugitives

Virginia, at various times refused to return whites to Pennsylvania and Ohio, where they were accused of kidnapping free blacks. *Id.* at 134-36. Similarly, on two separate occasions Missouri refused to return kidnappers to Illinois. See Paul Finkelman, *Slavery, the 'More Perfect Union,' and the Prairie State*, 80 ILL. HIST. J. 248, 260 (1987).

59. See Finkelman, *Seward's New York*, *supra* note 58.

60. 65 U.S. (24 How.) 66 (1861).

61. At this time, only Justice McLean could be considered opposed to slavery. The other northerners on the Court were "doughfaces"—northern men with southern principles—who consistently voted to support the interest of slavery.

62. For example, in 1950, Governor G. Mennen Williams of Michigan refused Alabama's request for the extradition of one of the Scottsboro Boys who had escaped from prison. Similarly, in the 1970s, Governor Jerry Brown of California refused to order the extradition to South Dakota of Native American activist Russell Means.

In 1987, the Supreme Court overturned *Dennison* in *Puerto Rico v. Branstad*, 483 U.S. 219 (1987). In an opinion by Justice Thurgood Marshall, the Court gave no weight to the historic use of gubernatorial discretion in extradition cases; it left governors without the power to protect minorities, victims of local political vendettas, and people falsely convicted of crimes who have sought refuge in other states. The political and civil situations of the mid-nineteenth century prevented Congress from requiring states to comply with Article IV's Criminal Extradition Clause. *Branstad*, however, was decided in the late twentieth century.

from justice for slavery-related crimes. This was a consistent pattern from 1791, when the governor of Virginia refused to extradite kidnappers to Pennsylvania, to 1861, when the governor of Ohio refused to extradite a free black accused of slave stealing in Kentucky. The *only* exception to this pattern was *Prigg*, in which Maryland returned Edward Prigg to Pennsylvania so that he could stand trial for kidnapping. This return was possible only because 1) Maryland was anxious to have the Supreme Court give a definitive ruling on the validity of Pennsylvania's Personal Liberty Law, and 2) Pennsylvania guaranteed both an expedited review of the case by the state supreme court and that, if convicted, Prigg would not be incarcerated until after the Supreme Court ruled on the case.⁶³

4. The Fugitive Slave Clause

Given the foregoing analysis of the structure of the Constitution and of Article IV, it is reasonable to conclude that the Framers did not intend federal enforcement of the Fugitive Slave Clause. Structurally at least, fugitive slave rendition, like privileges and immunities and criminal extradition, seemed to be a matter of comity.

State law at the time of the adoption of the Constitution supports this assertion. In 1787, Pennsylvania, Connecticut, and Rhode Island were ending slavery through gradual emancipation statutes.⁶⁴ Under these laws, no new slaves could be brought into these states and the children of slaves were born free. The institution of slavery in those states would die out as the present generation of slaves died.⁶⁵ Nevertheless, these northern states recognized that slaves from other states might enter their jurisdictions seeking freedom. Thus, Pennsylvania provided for the return of fugitive slaves.⁶⁶ Rhode Island and Connecticut followed

63. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 609 (1842). Some of the negotiations surrounding the extradition between Maryland and Pennsylvania are discussed in CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64*, at 537-38 (1974).

64. An Act for the Gradual Abolition of Slavery, *reprinted in* 1 *LAWS OF THE COMMONWEALTH OF PENNSYLVANIA* 492-96 (Philadelphia, 1810); Gradual Emancipation Act of 1874, *reprinted in* PUBLIC LAWS OF RHODE ISLAND 441-44 (Providence, 1822); Gradual Emancipation Act of 1784, *reprinted in* LAWS OF CONNECTICUT, tit. 22, 23 (1821).

65. See generally FINKELMAN, *AN IMPERFECT UNION*, *supra* note 25; ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION* (1967).

66. An Act for the Gradual Abolition of Slavery, *supra* note 64, at 492-93. Section 9 of this law provided for the return of fugitive slaves.

Pennsylvania's lead.⁶⁷ So did New York and New Jersey, which had not taken any steps to end slavery by 1787.⁶⁸ Even Massachusetts, which had fully abolished slavery by 1787, provided for the return of fugitive slaves.⁶⁹

The existence of these statutes supports the argument that the Fugitive Slave Clause was merely an admonition to the states to return fugitive slaves. Under this analysis, the only role of the federal government would be judicial review of any state law which purported to authorize the emancipation of fugitive slaves.

Whatever the Framers' intent, Congress adopted a statute in 1793 that prescribed the procedures for the return of both fugitives from justice and fugitive slaves. Without any hesitation, President Washington signed this bill into law.⁷⁰

B. The Criminal Extradition and Fugitive Slave Act of 1793

The law that Washington signed⁷¹ contained four separate sections. The first two dealt with the extradition of fugitives from justice and the last two with the rendition of fugitive slaves. This order of the sections mirrored the form of Article IV, Section 2 of the Constitution.

Sections 1 and 2 of the law set out the procedures for criminal extradition.⁷² A governor seeking a fugitive from justice was required to send to his counterpart in the state to which the fugitive had fled, a copy of an indictment, "or an affidavit made before a magistrate," charging the alleged fugitive with a crime.⁷³ These documents had to be certified by the governor of the state "from whence the person so charged fled."⁷⁴ The governor receiving this information was then to have the fugitive arrested and to notify "the executive authority making such demand" or his appointed agent.⁷⁵ If no agent claimed the fugitive

67. The gradual abolition acts of Rhode Island and Connecticut, both passed in 1784, had provisions similar to Pennsylvania's.

68. See, e.g., ZILVERSMIT, *supra* note 65, at 12-13.

69. Act of Mar. 26, 1788, 1788 MASS. GEN. L. 680-682, repealed *sub silentio* by Act of Mar. 29, 1834, 1834 MASS. STAT.

70. See Finkelman, *Kidnapping of John Davis*, *supra* note 21.

71. Act of 1793, *supra* note 3.

72. §§ 1, 2.

73. § 1.

74. *Id.*

75. *Id.*

within six months, the fugitive was to be released; anyone rescuing a fugitive from custody was subject to a fine and imprisonment.⁷⁶

Although the Act of 1793 declared that "it shall be the duty of the executive authority" to act on an extradition requisition, it did not provide for enforcement mechanisms or penalties in the event a governor failed to act.⁷⁷ The statute merely set out the procedure for requesting extradition. As I have already noted, in 1861, in *Kentucky v. Dennison*, the Supreme Court held that the procedure, while required by the Constitution, could not be imposed on a governor.⁷⁸ If a state governor refused to act, the federal government could not compel his cooperation.⁷⁹

Sections 3 and 4, which dealt with the rendition of fugitive slaves, neither vested responsibility for the enforcement of the law in any person or official nor set a standard by which the seized person's status as a fugitive was to be proved.⁸⁰ Section 3 specified the process for rendition.⁸¹ Under Section 4, any person interfering with this process could be sued for five hundred dollars by the owner of the alleged slave.⁸² In addition, the owner could initiate a separate suit for any "injuries" caused by this interference. Injuries, in this context, might include loss of the slave, physical damages to the claimant or the slave, or the costs of the rendition.

1. Personal Liberty Laws

The Fugitive Slave Act did not function smoothly in the antebellum period. Its weak evidentiary standards gave rise to the kidnapping of

76. § 2.

77. §§ 3, 4.

78. See *supra* notes 60-62 and accompanying text.

79. See *supra* notes 60-62 and accompanying text.

80. Act of 1793, *supra* note 3, § 3.

81. *Id.* That process was as follows: 1) a claimant obtained a warrant to seize a runaway slave; 2) the alleged slave was brought before any federal judge or "any magistrate of a county, city, or town corporate" where the fugitive was seized; and 3) the claimant offered "proof to the satisfaction of such judge or magistrate" that the person seized was a fugitive slave owned by the claimant. *Id.* This proof could be oral or through an "affidavit taken before, and certified by, a magistrate" of the state from where the alleged slave fled. *Id.* Upon satisfactory proof, the judge or magistrate who heard the case issued a certificate of removal to the claimant. § 4.

82. § 4.

free blacks.⁸³ Several states adopted legislation, known as “personal liberty” laws, to protect free blacks from kidnapping.⁸⁴

One such law was Pennsylvania’s 1826 Personal Liberty Law.⁸⁵ While it may have been used to frustrate the return of fugitive slaves, the law had been adopted primarily to prevent kidnapping.⁸⁶ At the time of its adoption “it is unlikely that many, except the militant antislavery people, understood that the law was subject to interpretations which would virtually deny the recovery of runaways in Pennsylvania.”⁸⁷ Although the Pennsylvania Abolition Society thought this law was “a manifest improvement upon the previously existing laws,” the law hardly offered blacks due process.⁸⁸ A single magistrate in Pennsylvania, without the aid of a jury, would decide the status of the alleged slave. New Jersey also adopted a personal liberty law in 1826,⁸⁹ and most other northern states followed its lead.⁹⁰ These laws “represent[ed] a voluntary effort to find a workable balance between a

83. Kidnapping was not an unrealistic fear. Shortly before Pennsylvania adopted its Personal Liberty Law, five free black youths were kidnapped in Philadelphia and sold as slaves. Three of the kidnapped victims were returned to Philadelphia after “they fell into the hands of a humane protector” in Mississippi; the other two died during their illegal captivity. See *Pennsylvania Fugitive Slave Act of 1826*, *supra* note 4, at 439. In July of 1836, a free black named George Jones was falsely arrested on criminal charges in New York City, and, in a secret proceeding, declared a fugitive slave. David Ruggles, *Kidnapping in the City of New York*, *LIBERATOR*, Aug. 3, 1836, at 127. Similar incidents occurred with some frequency in the mid-1830s in New York. Lawrence B. Goodheart, *The Chronicles of Kidnapping in New York: Resistance to the Fugitive Slave Law*, reprinted in 6 *ARTICLES ON AMERICAN SLAVERY: FUGITIVE SLAVES* 201 (Paul Finkelman ed., 1989).

84. See generally THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861* (1974).

85. See Pennsylvania Personal Liberty Law, *supra* note 4.

86. The first section, aimed at kidnappers, not slave-catchers, punished anyone who used “force and violence,” to

take and carry away, or cause to be taken or carried away, and shall by fraud or false pretence, seduce, or cause to be seduced, or shall attempt so to take, carry away, or seduce any negro or mulatto from any part or parts of this commonwealth, to any other place or places, whatsoever, out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever

Id.

87. See Leslie, *supra* note 4, at 440.

88. See MORRIS, *supra* note 84, at 52.

89. A Supplement to an Act entitled “An Act concerning slaves,” 51 N.J. LAWS 90 (1826).

90. MORRIS, *supra* note 84, at 57.

duty to protect free blacks and the obligation to uphold the legitimate claims of slave owners."⁹¹

2. Judicial Hostility

By 1842, the highest courts of four northern states had considered the Fugitive Slave Act. Two courts supported it,⁹² two did not.⁹³ At first glance this division would seem to indicate that the northern courts were evenly divided on the matter, but they were not. The supportive opinions were short, not very analytical, and relatively old. The state opinions attacking the federal law were newer, longer, and analytically stronger and more persuasive.

In 1819, the Supreme Court of Pennsylvania, in a brief opinion by Chief Justice William Tilghman, enforced the federal law and denied a fugitive slave had the right to a jury trial, but otherwise did not examine the constitutionality of the federal act.⁹⁴ Four years later, the highest court of Massachusetts also upheld the Fugitive Slave Act.⁹⁵ Writing for the court, Chief Justice Isaac Parker limited his analysis to "a single point: whether the statute of the United States giving power to seize a slave without a warrant is constitutional."⁹⁶ The Massachusetts court upheld this warrantless seizure because "slaves are not parties to the constitution, and the [Fourth] [A]mendment has [no] relation [to] the parties."⁹⁷ Parker merely noted, without any citation or actual reference

91. *Id.* Unfortunately, Morris does not discuss or analyze the New Jersey law.

92. *See* *Wright v. Deacon*, 5 Serg. & Rawle 62 (Pa. 1819); *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11 (1823).

93. *See* *State v. Sheriff of Burlington*, No. 36286 (N.J. 1836); *Jack v. Martin*, 14 Wend. 507 (N.Y. 1835) (also known as *Nathan, Alias Alex. Helmsley v. State*). Although officially unreported, the case was well known among abolitionists. *See Upholding Slavery*, 20 FRIEND, June 11, 1836, at 281-82 (portions of this article are reprinted as *Important Decision*, LIBERATOR, July 30, 1836, at 124). *Important Decision*, NEWARK DAILY ADVERTISER, Aug. 18, 1836; Letter from William Lloyd Garrison to Isaac Knapp (August 23, 1836) reprinted in 2 *The Letters of William Lloyd Garrison* 53 (Louis Ruchames ed., 1971). SALMON P. CHASE, SPEECH OF SALMON P. CHASE IN THE CASE OF THE COLORED WOMAN, MATILDA 18-19 (1837), reprinted in 2 SOUTHERN SLAVES IN FREE STATE COURTS; THE PAMPHLET LITERATURE 1 (Paul Finkelman ed., 1988). For a discussion of the Hornblower decision, see Paul Finkelman, *State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law of 1793*, 23 RUTGERS L.J. 753 (1992).

94. *See* *Wright*, 5 Serg. & Rawle at 62.

95. *Griffith*, 19 Mass (2 Pick.) at 11.

96. *Id.* at 18.

97. *Id.* at 19.

to the Constitution, that “[t]he constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by Congress.”⁹⁸

In contrast to these two slim and not particularly erudite opinions are the longer and more thoughtful opinions from New York and New Jersey. Significantly, both were decided only a few years before *Prigg*. The New York opinion is particularly important since it upheld the claim of the master and firmly supported the obligation of state officials to return fugitive slaves, yet categorically denied that Congress had the power to implement the Fugitive Slave Clause.

In *Jack v. Martin*,⁹⁹ Chancellor Reuben Walworth, speaking for New York’s highest court, found the Fugitive Slave Act unconstitutional because Congress lacked the power to pass such a law.¹⁰⁰ Walworth said he had

looked in vain among the powers delegated to congress by the constitution, for any general authority to that body to legislate on this subject. It is certainly not contained in any express grant of power, and it does not appear to be embraced in the general grant of incidental powers contained in the last clause of the constitution relative to the powers of congress.¹⁰¹

After careful consideration of the Constitution’s text and the state statutes existing in 1787, Walworth concluded that the Framers did not intend to give Congress the power to make such a law:

It is impossible to bring my mind to the conclusion that the framers of the constitution have authorized the congress of the United States to pass a law by which the certificate of a justice of the peace of the state, shall be made conclusive evidence of the right of the claimant, to remove one

98. *Id.*

99. 14 Wend. 507 (N.Y. 1835).

100. *Id.* The Court did, however, rule that under the United States Constitution, New York was obligated to enforce the Fugitive Slave Clause. New York’s highest court—the Court for the Correction of Errors—was a complicated amalgam of the state’s Chancellor, the Justices of the Supreme Court, and the 32 members of the state senate. In this case Senator Isaac W. Bishop, in a second opinion, asserted that the federal law was constitutional. Unlike other reports where there were multiple opinions, the report in this case did not indicate how many senators voted for each opinion. Moreover, New York reports seem to follow the United States Supreme Court’s policy of printing the opinion of the Court first. Thus, it seems reasonable to believe that Walworth, who wrote the lead opinion, spoke for a majority of the Court. Even if this were not the case, Walworth’s opinion, coming from the state’s chancellor, would have had more weight among jurists than the opinion of an obscure state senator.

who may be a free native born citizen of this state, to a distant part of the union as a slave; and thereby to deprive such person of the benefit of the writ of *habeas corpus*, as well as of his common law suit to try his right of citizenship in the state where the claim is made, and where he is residing at the time of such claim.¹⁰²

This decision was not, however, aimed at preventing the rendition of fugitive slaves. The court still found that every "state officer or private citizen, who owes allegiance to the United States and has taken the usual oath to support the constitution" was obligated to enforce the Fugitive Slave Clause of the Constitution.¹⁰³

A year later, in an unreported case,¹⁰⁴ Chief Justice Joseph Hornblower of New Jersey's highest court questioned the constitutionality of the Fugitive Slave Act on both substantive and structural grounds. Hornblower concluded that the Act provided for a "summary and dangerous proceeding" and afforded "but little protection of security to the free colored man, who may be falsely claimed as a fugitive from labor."¹⁰⁵ Hornblower also considered the validity of New Jersey's 1826 personal liberty law¹⁰⁶ in light of the Supremacy Clause, acknowledging that *if* Congress had "a right to legislate on this subject" New Jersey's law was "no better than a dead letter."¹⁰⁷ However, Hornblower was unwilling to acknowledge that Congress necessarily had such a power.¹⁰⁸

In his analysis of Article IV, Hornblower compared the Full Faith and Credit Clause, which explicitly gives Congress the power to pass laws,¹⁰⁹ with the Fugitive Slave Clause. Since no such explicit language exists in Section 2, the court concluded that "no such power was

101. *Id.* at 526.

102. *Id.* at 528.

103. *Id.*

104. *State v. Sheriff of Burlington*, No. 36286 (N.J. 1836).

105. *Opinion of Chief Justice Hornblower on the Fugitive Slave Law*, at 4 (1851), reprinted in 1 FUGITIVE SLAVES AND AMERICAN COURTS: THE PAMPHLET LITERATURE 97 (Paul Finkelman ed., 1988) [hereinafter *Hornblower Opinion*].

106. *Id.* at 7.

107. *Id.*

108. *Id.*

109. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. Section 3 of Article IV also explicitly empowers Congress to pass laws. U.S. CONST. art. IV, § 3, cl. 2.

intended to be given” to Congress for implementation of the clauses in that section of the Constitution.¹¹⁰ Indeed, Hornblower argued that Congressional legislation over the Privileges and Immunities Clause or over interstate rendition “would cover a broad field, and lead to the most unhappy results.”¹¹¹ Such legislation would “bring the general government into conflict with the state authorities, and the prejudices of local communities.”¹¹²

Obliquely noting the emerging pro-slavery argument in the South, the New Jersey court observed that in “a large portion of the country, the right of Congress to legislate on the subject of slavery at all, even in the district [of Columbia] and territories over which it has exclusive jurisdiction, is denied.”¹¹³ If the South could argue that slavery was beyond federal regulation, Hornblower was willing to join the issue, and make the same claim for freedom. If Congress could not regulate or abolish slavery in the District of Columbia, as southerners were beginning to argue, then surely, Hornblower asserted, Congress lacked the “right to prescribe the manner in which persons residing in the free states, shall be arrested, imprisoned, delivered up, and transferred from one state to another, simply because they are claimed as slaves.”¹¹⁴ Consistent with the northern states’ rights arguments of the antebellum period,¹¹⁵ Hornblower warned the “American people would not long submit” to such an expansive view of Congressional power.¹¹⁶ Although this analysis seemed to lead to the conclusion that the Fugitive Slave Act was unconstitutional, Hornblower declined “to express any definitive opinion on the validity of the act of Congress.”¹¹⁷ He could avoid this grave responsibility because the case before him had been brought “in pursuance of the law of this state.”¹¹⁸ However, Hornblower’s position on the unconstitutionality of the federal law was unambiguous.¹¹⁹

110. *Hornblower Opinion*, *supra* note 105, at 4-5.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See Finkelman, *States Rights*, *supra* note 49.

116. *Hornblower Opinion*, *supra* note 105, at 4-5.

117. *Id.* at 5.

118. *Id.*

119. *Id.*

IV. THE OPINION OF THE COURT: WHAT STORY SAID

Shortly before *Prigg* reached the Supreme Court, two important state courts, New York and New Jersey, speaking through distinguished jurists, Walworth and Hornblower, had concluded that Congress lacked the power to pass the Fugitive Slave Law. Equally important, by sustaining Prigg's conviction, the Pennsylvania Supreme Court had also decided in favor of state power to protect free blacks from kidnapping. Against the background of these cases and the growing antislavery movement of the 1830s and early 1840s, the Court heard and decided *Prigg*.

A. *The Opinion of the Court*

Although there were seven separate opinions, Justice Story's Opinion of the Court is central to an understanding of *Prigg*. All observers at the time agreed that his opinion was the official interpretation of the Fugitive Slave Act and of the Fugitive Slave Clause. Justices Taney, Thompson, Baldwin, Wayne, and Daniel concurred in the result, but only Wayne agreed with all of the specifics of Story's opinion. Justices Catron and McKinley silently agreed with Story's opinion. Justice McLean's "separate opinion" was clearly a dissent.¹²⁰

1. Counting Noses

It is not surprising that *Prigg* confuses modern scholars because contemporary observers were also confused. For example, Supreme Court reporter Richard Peters produced a pamphlet version of the case, where he incorrectly declared that "all the laws of the several states relative to fugitive slaves are unconstitutional and void."¹²¹ In the

120. See *infra* notes 146-50 and accompanying text (Table I).

121. REPORT OF THE CASE OF EDWARD PRIGG AGAINST THE COMMONWEALTH OF PENNSYLVANIA. ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES AT JANUARY TERM, 1842. IN WHICH IT WAS DECIDED THAT ALL THE LAWS OF THE SEVERAL STATES RELATIVE TO FUGITIVE SLAVES ARE UNCONSTITUTIONAL AND VOID; AND THAT CONGRESS HAVE THE EXCLUSIVE POWER OF LEGISLATION ON THE SUBJECT OF FUGITIVE SLAVES ESCAPING INTO OTHER STATES (Richard Peters ed., 1842) [hereinafter REPORT OF THE CASE]. The text of this pamphlet is exactly the same as that published in *Prigg*, 41 U.S. (16 Pet.) 539 (1842). However, the subtitle and the preface reveal that Peters was either confused about what Story held or that he purposefully followed the lead of Chief Justice Taney. The subtitle of his pamphlet stated that in this case "it was decided that all the laws of the

pamphlet's preface (but significantly, not in the official United States Reports) Peters declared that "no state judicial officer, under the authority of state laws, can act in the matter."¹²² Both statements are untrue.¹²³ Former President John Quincy Adams noted in his diary that *Prigg* consisted of "seven judges, every one of them dissenting from the reasoning of all the rest, and every one of them coming to the same conclusion—the transcendent omnipotence of slavery in these United States, riveted by a clause in the Constitution."¹²⁴ Even this trenchant analysis was not entirely accurate; although Justice McLean agreed that the federal fugitive slave law was constitutional, he clearly did not accept the "omnipotence of slavery."¹²⁵

Modern constitutional scholars assess whether every particular part of an opinion has a majority. They often count noses to determine if there is a majority voting for a particular aspect of a case. A nose-counting for *Prigg* might be:¹²⁶ Justice Wayne explicitly supported Story on all points; Justices Catron and McKinley were silent, which was equivalent to assent. Counting his own vote, Story had four votes on all points. He needed the support of at least one other justice on each aspect of his opinion to insure a five-vote majority.

On most issues, Story had an overwhelming majority. Every justice but Baldwin agreed that the fugitive slave provisions of the Act of 1793 were constitutional.¹²⁷ Chief Justice Taney and Justices Thompson,

several states relative to fugitive slaves are unconstitutional and void; and that Congress shall have the exclusive power of legislation on the subject of fugitive slaves escaping into other states." REPORT OF THE CASE, *supra*, at title page.

122. *Id.* at 3, 8.

123. Peters' inaccurate analysis was probably a function of reading Chief Justice Taney's concurrence more carefully than Story's opinion.

124. 9 MEMOIRS OF JOHN QUINCY ADAMS 336 (Charles Francis Adams ed., Philadelphia, 1876).

125. *Prigg*, 41 U.S. (16 Pet.) at 660-61 (McLean, J., dissenting).

126. Again, the court and the nation accepted Story's opinion as the Opinion of the Court and the authoritative interpretation of the law. Dissents or concurrences were far less relevant in the antebellum period.

127. It is difficult to know where Justice Baldwin stood on most issues. His entire opinion consisted of two sentences:

Mr. Justice BALDWIN, Concurred with the Court in reversing the judgment of the supreme court of Pennsylvania, on the ground, that the act of the legislature was unconstitutional; inasmuch as the slavery of the person removed was admitted, the removal could not be kidnapping. But he dissented from the principles laid down by the [C]ourt as the grounds of their opinion.

Prigg, 41 U.S. (16 Pet.) at 636.

Baldwin, and Daniel also agreed with Story that Pennsylvania's Personal Liberty Law was unconstitutional, that Prigg's conviction should be reversed, and that claimants had a right of self-help to recover fugitive slaves.¹²⁸ McLean dissented on all three points.¹²⁹ At least seven justices accepted the notion that fugitive slaves were not entitled to due process rights. McLean, in dissent, supported a procedure aimed at protecting free blacks from being seized.¹³⁰

The major debate within the Court centered on the states' role in the process of returning fugitive slaves. All of the justices agreed that states could not pass laws creating additional requirements to the federal law or impeding the return of fugitive slaves. However, they disagreed on how to define these terms. Equally controversial was the obligation of state officials to aid in the rendition process. Eight (or nine)¹³¹ of the justices believed that state officials should help to implement the clause, but they disagreed on the nature of that help. Nonetheless, a majority of the Court supported Story on these issues (whatever it was that Story said).¹³²

The key issue in deciding whether Story had a majority is the extent to which the Court accepted his argument that Congress had exclusive power to regulate the rendition of fugitive slaves. All of the Justices thought a majority supported Story on this point. Justice Daniel, who disagreed with what he thought Story said, noted in his concurrence:

The majority of my brethren . . . have thought themselves bound to pursue a different course; and it is in their definition and distribution of state and federal powers, and in the modes and times they have assigned for the exercising [of] those powers, that I find myself compelled to differ with them.¹³³

128. Baldwin was in favor of overturning Prigg's conviction "[i]nasmuch as the slavery of the person removed was admitted, the removal could not be kidnapping." *Id.* This statement implies support for the concept of self-help. Justice Wayne asserted that Baldwin upheld this right as well: "BALDWIN . . . contends, that the provision gives to the owners of fugitive slaves all the rights of seizure and removal which legislation could give . . ." *Id.* at 637.

129. *Id.* at 658-73.

130. *Id.* at 672-73.

131. Again, it is impossible to read Baldwin on this issue.

132. For an in-depth analysis of each Justice's stance, see *infra* part V.

133. *Prigg*, 41 U.S. (16 Pet.) at 651.

Clearly, Daniel saw himself in the minority on this issue. Similarly, Justice Wayne, who specifically concurred with Story's opinion in its entirety, declared that "[t]hree of the judges have expressed the opinion, that the states may legislate upon the [Fugitive Slave Clause], in aid of the object it was intended to secure."¹³⁴ It is not clear which three justices Wayne had in mind,¹³⁵ but he believed, without contradiction, that only three members of the Court disagreed with Story (and Wayne) on this issue.

Story's son asserted that *four* justices rejected federal exclusivity.¹³⁶ Kent Newmyer speculates that they were Taney, Daniel, and Thompson, who "came out specifically against the principle," and Baldwin, "in light of his states' rights jurisprudence and his general dislike of his colleague's conspicuous erudition."¹³⁷ Newmyer further notes that both Catron and McKinley "were inclined to resist extreme nationalist positions and neither was especially deferential to Story."¹³⁸ Newmyer also suggests that Taney's "use of the phrase 'as I understand the opinion of the court'" in his opinion might indicate he did not believe that a majority of the Court supported federal exclusivity.¹³⁹

This analysis, however, is problematic. If Catron and McKinley disagreed with Story on this point, one would assume they would have said so in separate opinions. Because they did not write separate opinions in a case where every other justice *did* write an opinion, we can only conclude that they agreed with Story, or at least accepted his position or acquiesced to it. Similarly, Justice Wayne specifically noted that Justice Baldwin "concur[s] in the opinion, if legislation by Congress be necessary, . . . the right to legislate is exclusively in Congress."¹⁴⁰ It is unlikely that Baldwin would have acquiesced silently to Wayne's statement if it misrepresented his position. Thompson clearly stated his

134. *Id.* at 637.

135. Two of the Justices were Taney and Daniel. Thompson believed that the states were free to act in the absence of federal law, but that federal law would supersede all state law.

136. 2 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 392 (Boston, Little Brown 1851).

137. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 374 (1985).

138. *Id.* at 374-75.

139. *Id.* at 375.

140. *Prigg*, 41 U.S. (16 Pet.) at 637.

opposition to exclusivity, *but* only in the absence of Congressional legislation.¹⁴¹ However, this was purely hypothetical, because Congress had passed such legislation. Thus, under the existing circumstances, Thompson supported exclusivity.¹⁴²

Thus, it seems that Story had a majority for all of his points. Only Daniel¹⁴³ and Taney¹⁴⁴ opposed exclusivity based on Congressional preemption. Taney's cryptic reference to the Court's opinion—"as I understand the opinion of the court,"¹⁴⁵—reflects the confusion caused by the opinion and Taney's hostility to the opinion.

TABLE I

How the Court Voted on Issues in *Prigg*

	St	Ca	Mc	Ta	Th	Ba	Wa	Da	McL
Overturn Prigg's conviction	Y	Y	Y	Y	Y	Y	Y	Y	N
Pa. law void	Y	Y	Y	Y	Y	Y	Y	Y	N
1793 law upheld	Y	Y	Y	Y	Y	N ¹⁴⁶	Y	Y	Y
Right of self-help	Y	Y	Y	Y	Y	Y	Y	Y	N
States cannot pass laws adding requirements to federal law or impeding return of fugitive slaves	Y	Y	Y	Y	Y	Y	Y	Y	Y ¹⁴⁷

141. *Id.* at 635.

142. *Id.*

143. *Id.* at 650-58.

144. *Id.* at 626-33.

145. *Id.* at 627.

146. Based on Wayne's statement: "All of the members of the court, too, except my brother Baldwin, concur in the opinion that legislation by congress, to carry the provision into execution, is constitutional . . ." *Prigg*, 41 U.S. (16 Pet.) at 637.

147. McLean, however, wanted a due process procedure to protect free blacks. *Id.* at 672-73. Once the Court determined a person was a fugitive slave, McLean would allow any state law to delay the rendition process. *Id.* at 660-61.

	St	Ca	Mc	Ta	Th	Ba	Wa	Da	McL
Power of Congress to regulate return of fugitive slaves is exclusive	Y	Y	Y	N	N ¹⁴⁸	Y ¹⁴⁹	Y	N	Y
Congressional regulation supersedes state regulation	Y	Y	Y	N	Y	0	Y	N	Y
State officials have a moral and Constitutional obligation to enforce the 1793 law	Y	Y	Y	Y	Y	0	Y	Y	Y
Congress cannot force state officials to act	Y	Y	Y	N	0	0	Y	N	?
States can decline to enforce federal law	Y	Y	Y	N	0	0	Y	N	?
States under their police power may arrest fugitive slaves	Y	Y	Y	Y	Y	0	Y	Y	0
State laws aiding rendition but not adding to federal law are valid even if Congress has acted	?	?	?	Y	?	0	?	Y	?
State laws implementing Fugitive Slave Clause valid if Congress has not acted ¹⁵⁰	N	N	N	Y	Y	0	N	Y	Y

148. Thompson argued that states may act in the absence of a federal statute, but that Congress has exclusive power once it actually passes a law. *Id.* at 634-35.

149. Based on Wayne's statement: "[H]e [Baldwin] concurs in the opinion, if legislation by Congress be necessary, that the right to legislate is exclusively in Congress." *Id.* at 637.

150. This issue was not actually before the Court since Congress had, in fact, passed a law implementing the Fugitive Slave Clause. Thus, Story's lack of a majority on this point is moot.

	St	Ca	Mc	Ta	Th	Ba	Wa	Da	McL
Allow states laws to protect free blacks	N	N	N	N	0	? ¹⁵¹	N	N	Y
Due process of alleged fugitive slaves	N	N	N	N	0	0	N	N	Y

Y=Yes N=No 0=no indication ?=mixed, contradictory position

2. The Importance of Story's Authorship

The antebellum Court did not count noses this carefully. Story wrote the "Opinion of the Court" and the nation accepted it as such. Although this Article concludes that Story had a majority for all of his points, the fact that Story wrote the opinion is more important than that conclusion. The Court's decision upholding the Fugitive Slave Act and striking down all state personal liberty laws was far more palatable coming from the scholarly New Englander than from a southerner. The Court hoped Story's enormous prestige would give the decision the kind of lustre it needed to be accepted by the North, which was becoming increasingly hostile to slavery and to the return of fugitive slaves.

The importance of Story writing the Opinion of the Court was underscored in the fileopietistic two volume *Life and Letters of Joseph Story* published by the Justice's son. William Wetmore Story claimed that his father in fact did not want to write the opinion, "[b]ut urged to this position by the strenuous request of his brother Judges, he did not feel authorized to decline what he considered to be his duty, however unpleasant it might be."¹⁵² Whether Story was actually reluctant is uncertain. His son's statement on this point, as well as others, must be read skeptically. The volumes were partly a son's attempt to rehabilitate his father's image, which was tarnished by the proslavery aspects of *Prigg*. The point is clear, however, that either Story or his son (or both) understood the political importance of his writing the opinion.

The content of Story's Opinion of the Court is also more important than whether Story had a majority on all points. There was confusion as

151. Baldwin seemed to accept this idea by noting that Prigg's conviction should be overturned because the people he seized were slaves. *Id.* at 636. This implies that the state could interfere if they were not slaves. However, Baldwin also favored striking down the Pennsylvania Personal Liberty Law. *Id.* at 635.

152. 2 STORY, *supra* note 136, at 391.

to what Story's opinion held on a few key points. This confusion stems from four factors mentioned previously: 1) the seven separate opinions; 2) Taney's mischaracterization of what Story actually held; 3) Richard Peters's pamphlet edition of *Prigg*, incorporating in the title and preface Taney's mischaracterization; and 4) statements by William Wetmore Story that his father believed the decision was a "triumph of freedom."¹⁵³

B. *What Story Said*

Story began his opinion by noting the cooperation of Maryland and Pennsylvania¹⁵⁴ and the "delicate and important considerations"¹⁵⁵ raised by the case. Acknowledging the "profound and pervading interest" of the public, he assured the nation that the Justices had given "their most deliberate examination" to the case.¹⁵⁶ Thus, he set the stage to persuade the North that the decision to strike down legislation adopted by most of that region was legitimate and grounded in the Constitution.

The overriding theme of Story's opinion was national power and the protection of slavery. The implications and results were profound: Story 1) nationalized slavery, at least for purposes of fugitive slave rendition; 2) severely undermined the ability of the North to protect free blacks from kidnapping; and 3) set the stage for an enhancement of national power at the expense of the states.

1. Nationalizing Slavery and the Right of Self-Help

Early in his opinion, Story offered a stunning analysis of the Fugitive Slave Clause and the place of slavery in the constitutional order.¹⁵⁷ Story sought, rhetorically at least, to give something to the North, but in the end he handed the South an enormous victory.

Story conceded that slavery was a "mere municipal regulation, founded upon and limited to the range of the territorial laws."¹⁵⁸ Story would later claim this principle made the decision a "triumph of

153. 2 *id.* at 392.

154. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 609 (1842).

155. *Id.* at 610.

156. *Id.*

157. *Id.* at 611-18.

158. *Id.* at 611.

freedom” because it “localized slavery, and made it a municipal institution of the States, not recognized by international law, and except, so far as the exact terms of the clause relating to fugitive slaves extending, not recognized by the Constitution.”¹⁵⁹ This analysis could have provided some ammunition for the constitutional wing of the antislavery movement.¹⁶⁰

However, after asserting that slavery was a local institution, Story undermined and destroyed any pro-freedom aspects of this analysis. He found that the Constitution gave masters a right of self-help, “to seize and recapture his slave” anywhere in the nation regardless of state or federal statutory law.¹⁶¹ Thus, while proclaiming slavery to be a creature of municipal law, Story actually nationalized it, nearly making *freedom* a “mere municipal regulation.” He nationalized slavery by concluding that the claimant had a right of self-help, a common-law right to take a fugitive slave wherever found, without any due process protection for the alleged slave.

(a) A Common-Law Right of Recaption—The Right of Self-Help

Story claimed that the fugitive slave clause “manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain.”¹⁶² After quoting Blackstone on common-law recaption, Story declared:

Upon this ground, we have not the slightest hesitation in holding, that under . . . the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.¹⁶³

159. 2 STORY, *supra* note 136, at 392. For further discussion, see section VI *infra*.

160. 2 *id.* Charles Sumner later remarked, however, that the argument was of little value when compared with “the tyrannical power which he placed in the hands of a slave hunter.” Letter from Charles Sumner to Salmon P. Chase (Mar. 12, 1847), *quoted in* SWISHER, *supra* note 63, at 542-43.

161. *Id.* at 613.

162. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842).

163. *Id.* at 613.

This conclusion was extraordinary. It meant that any southerner could seize any black and remove that person to the South without any state interference, as long no "breach of the peace" occurred. One might presume that a "breach of the peace" would always occur when a black, especially a free one, was seized by a slavecatcher or kidnapper. However, for both logical and practical reasons, this was not always the case.

In his dissent, Justice McLean pointed out the logical problems of limiting Story's right of self-help to instances in which there was no breach of the peace:

But it is said, the master may seize his slave wherever he finds him, if by doing so, he does not violate the public peace; that the relation of master and slave is not affected by the laws of the state, to which the slave may have fled, and where he is found. If the master has a right to seize and remove the slave, without claim, he can commit no breach of the peace, by using all the force necessary to accomplish his object.¹⁶⁴

In other words, McLean feared that under Story's opinion no amount of violence against an alleged slave would be illegal. Using Story's logic, it would never be a breach of the peace for a master to take his slave by brutal force.

There was also a practical problem. Seizures at night or in isolated areas could be accomplished without anyone observing a breach of the peace. Once a black was shackled, intimidated, and perhaps beaten into submission, travel from the North to the South could be accomplished without any obvious breach of the peace. If state officials could not stop a white transporting a black in chains, then kidnapping of any black could always be accomplished. Under such a rule anyone, especially children, might be kidnapped and enslaved. Kidnappings of this sort had led to the enactment of Pennsylvania's Personal Liberty Law. Story left the states powerless to prevent this type of kidnapping.

Story's opinion effectively made the law of the South the law of the nation. In the South, race was a presumption of slave status¹⁶⁵ and by giving masters and slave-hunters a common-law right of recaption, Story nationalized this presumption. As a result, slave-catchers could operate in the North without having to prove the seized person's slave

164. *Id.* at 668 (McLean, J., dissenting).

165. See generally Paul Finkelman, *The Crime of Color*, 67 *TULANE L. REV.* 2063 (1993).

status. The consequences for the nearly 175,000 free blacks in the North could have been dire.

(b) Nationalizing Southern Treatment of Slaves

Story's opinion also came close to nationalizing the southern treatment of slaves. Story declared that the Fugitive Slave Clause "put[s] the right to the service or labour upon the same ground, and to the same extent, in every other state as in the state from which the slave escaped, and in which he was held to the service or labour."¹⁶⁶ Moreover, "all the incidents to that right attach also. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him, as property"¹⁶⁷

Story did not explain what he meant when he said that "all the incidents to the right attach," but from a northern perspective, this proposition certainly was dangerous. The "incidents" of slavery included the right to punish in the most barbaric and inhumane ways, short of killing.¹⁶⁸ As North Carolina's Chief Justice Thomas Ruffin noted, slavery was predicated on "obedience" created by the master's "uncontrolled authority over the body" of the slave.¹⁶⁹ Ruffin wrote, "[t]he power of the master must be absolute to render the submission of the slave perfect."¹⁷⁰ Any judicial interference with the master's power to punish the slave would be "abrogating at once the rights of the master and absolving the slave from his subjection."¹⁷¹ This "curse of slavery" was "inherent in the relation of master and slave."¹⁷² With ironic eloquence Ruffin wrote:

[T]here may be particular instances of cruelty and deliberate barbarity where, in conscience, the law might properly interfere But we cannot look at the matter in that light. The truth is that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of

166. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 613 (1842).

167. *Id.*

168. On cruelty to slaves and the law, see Judith K. Schafer, "Details Are of a Most Revolting Character": *Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, 68 CHI.-KENT L. REV. 1283 (1993); Judith K. Schafer, *Sexual Cruelty to Slaves: The Unreported Case of Humphreys v. Utz*, 68 CHI.-KENT L. REV. 1313 (1993).

169. *State v. Mann*, 13 N.C. (2 Dev.) 167, 169 (1829).

170. *Id.*

171. *Id.* at 170.

justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God.¹⁷³

In his analysis of a master's rights, Ruffin argued that the law could not interfere with the punishment of a slave because of the personal nature of the relationship between master and slave. Ruffin noted that punishment often resulted from the "wrath of the master, prompting him to bloody vengeance upon the turbulent traitor"¹⁷⁴ Certainly no aspect of slavery more resembled treason against the master than the escape of a slave; none was more likely to stimulate the "wrath of the master."

We cannot know if Story meant to give the slave-catcher all the powers of a master, but his opinion was certainly open to that interpretation. The implications of that interpretation were frighteningly clear for fugitive slaves and free blacks in the North, as well as for those concerned with keeping the evils of slavery out of the free states.

2. The Constitutionality of the 1793 Fugitive Slave Act

Story found that masters could rely not only on their right of self-help, but also on federal enforcement of the Fugitive Slave Clause.¹⁷⁵ He concluded that Congress possessed sweeping enforcement power, asserting that the Act of 1793 was "clearly constitutional in all its leading provisions."¹⁷⁶ In reaching this conclusion, Story ignored both the text and structure of the Constitution. Despite the obvious implication that the structure of the Constitution did not grant Congress

172. *Id.*

173. *Id.*

174. *Id.*

175. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622 (1842).

176. *Id.* at 622. Story couched this conclusion in Marshallian terms:

The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is intrusted [sic]. The clause is found in the national constitution, . . . [and] the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.

Id. at 615-16.

the power to enforce the clause, Story simply did not confront the structural arguments, which is not surprising given Story's nationalist views and his desire to strengthen the federal government. He most likely dismissed the structural arguments in his own mind as irrelevant and unworthy of refutation.

Story's response to state opinions on the constitutionality of the Fugitive Slave Act undermines his reputation as a scholar and a judge. His failure to cite Chief Justice Hornblower's opinion *State v. Sheriff of Burlington*¹⁷⁷ might be explained on the ground that it was unreported. However, the case was known to lawyers, and Ohio attorney Salmon P. Chase had cited it while arguing a case in 1837.¹⁷⁸

Story's failure to carefully and honestly consider the important New York opinion in *Jack v. Martin*¹⁷⁹ is more troubling. Both counsel for Pennsylvania, Thomas Hambly, and Attorney General Ovid F. Johnson, mentioned the case in the argument before the Supreme Court. Hambly pointed out that in *Jack v. Martin*:

[T]he question of constitutionality was debated, and in my judgment not a single solid reason was given for that construction, but, on the contrary, Chancellor Walworth says, "I have looked in vain among the delegated powers of congress for authority to legislate upon the subject," and concludes that state legislation is ample for the purpose.¹⁸⁰

Pennsylvania's Attorney General noted that the states were divided on the constitutionality of the Fugitive Slave Act. He pointed out that *Commonwealth v. Griffith*¹⁸¹ and *Jack v. Martin* "exhibit[ed] a most striking illustration of the 'uncertainty of the law.'"¹⁸² In these two cases "the courts were divided in opinion" while in various Pennsylvania cases "the question did not properly arise, and the Court, without examination, declared its opinion on the constitutionality of the act of Congress of 1793."¹⁸³

177. No. 36286 (N.J. 1836).

178. SALMON P. CHASE, SPEECH OF SALMON P. CHASE IN THE CASE OF THE COLORED WOMAN, MATILDA 18 (1837), reprinted in 2 SOUTHERN SLAVES IN FREE STATE COURTS: THE PAMPHLET LITERATURE 1 (Paul Finkelman ed., 1988).

179. 14 Wend. 507 (N.Y. 1835).

180. *Prigg*, 41 U.S. (16 Pet.) at 584.

181. 19 Mass. (2 Pick.) 11 (1823).

182. *Prigg*, 41 U.S. (16 Pet.) at 591.

183. *Id.* at 591-92.

Story, famous as a legal scholar, unblushingly distorted Walworth's position. He wrote:

it has naturally been brought under adjudication in several states in the Union, and particularly in Massachusetts, New York, and Pennsylvania, and on all these occasions its validity has been affirmed. The cases cited at the bar . . . *Jack v. Martin* . . . are directly in point.¹⁸⁴

This statement is flatly wrong. *Jack v. Martin* did not affirm the constitutionality of the Fugitive Slave Act; rather, it totally rejected its constitutionality. It is hard to imagine how Story could have written this with a straight face. Determined, however, to let nothing stand in his way, he did more than ignore countervailing precedents: he rewrote them to support his own opinion.

3. Federal Exclusivity and State Power

In upholding the Fugitive Slave Act, Story emphatically rejected the notion that "the power of legislation upon this subject" could be "concurrent in the state."¹⁸⁵ Instead, Story concluded that Congress had exclusive jurisdiction over fugitive slave rendition. Because the power was exclusive, the states could not adopt any legislation which would conflict with federal law. Story asserted "that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it."¹⁸⁶ Consequently, he ruled the Pennsylvania law unconstitutional.¹⁸⁷ In language reminiscent of Chief Justice Marshall's opinion in *Gibbons v. Ogden*,¹⁸⁸ Story wrote:

[I]f congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere and as it were, by way of compliment [sic] to the legislation of congress, to

184. *Id.* at 621.

185. *Id.* at 617.

186. *Id.*

187. *Id.* at 626.

188. 9 Wheat. 1 (1824).

prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose.¹⁸⁹

Thus, Story stated "that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."¹⁹⁰

Story's analysis of the structure of the Constitution led him to conclude that the states had no power to regulate any aspects of fugitive slave renditions,¹⁹¹ which was a sweeping victory for the South. No state law interfering with the return of a fugitive slave could be valid. The slightest delay would be improper. Indeed, this southern victory was so complete that it was impractical. Thomas Hambly, one of the counsel for Pennsylvania, argued that, under such an interpretation of the Constitution, if two people claimed the same slave, no state law could even delay the rendition process long enough to sort out who the true owner was. He asked "What is to be done? Allow these parties to wrangle it out in the streets, to settle the question with dirk and bowie knife, to execute the judgment of Solomon?"¹⁹²

In denying the states a role in the rendition process, Story ignored the fact that several of Morgan's children were born in Pennsylvania and that Prigg initially seized her freeborn husband. Justice McLean, in dissent, complained that Story's opinion completely ignored the right and obligation of the free states to protect their free black citizens from

189. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 617-18 (1842).

190. *Id.* at 618 (citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 21-22 (1820)).

191. He explained:

The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labour, in consequence of any state law or regulation . . . [A]ny state law or state regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labour, operates, *pro tanto*, a discharge of the slave therefrom. The question can never be, how much the slave is discharged from; but whether he is discharged from any, by the natural or necessary operation of state laws or state regulations. The question is not one of quantity or degree, but of withholding or controlling the incidents of a positive and absolute right.

Id. at 611-12.

192. *Id.* at 578.

kidnapping.¹⁹³ Indeed, by taking the states out of the rendition process and creating a right of self-help, Story was setting the stage for kidnapping.

In their concurrences, Justices Taney, Daniel, and Thompson opposed Story's position on federal exclusivity, arguing for the concurrent power of the states to regulate rendition, as long as such state regulations were designed to *help* claimants.¹⁹⁴ Thompson thought that the states should be able to regulate fugitive slave rendition in the absence of federal legislation.¹⁹⁵ But on this point Story was emphatic: such a situation would lead to chaos with each state having "a different mode" for returning fugitives.¹⁹⁶

Story wanted uniformity and nationalization of law. His finding that Congress had exclusive jurisdiction would accomplish this goal. Also, at that time, and at least for the foreseeable future, it was not a dangerous position to take. In the 1840s it was inconceivable that Congress would repeal the Fugitive Slave Act or that any president would sign such a repeal.¹⁹⁷ Thus, by upholding the Fugitive Slave Act

193. *Id.* at 671-72 (McLean, J., dissenting).

194. *Id.* at 626-33 (Taney, C.J., concurring); *id.* at 650-56 (Daniel, J., concurring); *id.* at 633-36 (Thompson, J., concurring).

195. *Id.* at 633-36 (Thompson, J., concurring).

196. Story wrote:

If, then, the states have a right, in the absence of legislation by Congress, to act upon the subject, each state is at liberty to prescribe such regulations as suit its own policy, local convenience, and local feelings. The legislation of one state may not only be different from, but utterly repugnant to and incompatible with, that of another. The time, mode, and limitation of the remedy, the proofs of the title, and all other incidents applicable thereto, may be prescribed in one state, which are rejected or disclaimed in another. One state may require the owner to sue in one mode, another in a different mode. One state may make a statute of limitations as to the remedy, in its own tribunals, short and summary; another may prolong the period, and yet restrict the proofs: Nay, some states may utterly refuse to act upon the subject of [sic] all; and others may refuse to open its courts to any remedies *in rem*, because they would interfere with their own domestic policy, institutions or habits. The right, therefore, would never, in a practical sense, be the same in all the states. It would have no unity of purpose, or uniformity of operation. The duty might be enforced in some states; retarded, or limited in others; and denied, as compulsory in many, if not in all.

Id. at 623.

197. Until 1850, half of the Senate came from the South. Even after the admission of California in 1850, Minnesota in 1858, and Oregon in 1859, the South retained a virtual veto over hostile legislation because of the large number of Northern democrats who voted with the South. Furthermore, from 1828 until 1860, every elected president was

and finding exclusive jurisdiction in Congress, Story was able to fully nationalize the process of returning fugitive slaves without fear that slave owners would be left without a mechanism for capturing their escaped property.

4. State Power Under Story's Opinion

Story's seemingly emphatic and ironclad notion of federal supremacy,¹⁹⁸ nevertheless left room for some state action. Thus, despite the statements of an absolute ban on state legislation—such as that found in the title and preface of the pamphlet Richard Peters produced—some state legislation on fugitive slaves might be permissible. The discussion of the role of the states under the Fugitive Slave Act led to two questions. First, could the states pass legislation supportive of fugitive slave renditions? Second, could Congress authorize (or even require) state officials to enforce the fugitive slave portions of the Act of 1793? Story's handling of these two points, combined with his assertion of exclusive jurisdiction for Congress led to Taney's objections to portions of the "opinion of the court."

(a) State Legislation

Although Story found that Congress had exclusive power on the subject of fugitive slave rendition, he did not—contrary to what Taney would assert—prohibit all state legislation on the subject. The states were free to pass laws aiding the implementation of the Fugitive Slave Act as long as they did not place extra burdens on a claimant. In his opinion Story went out of his way to "guard . . . against any possible misconstruction" of the Court's view. The states' "police power . . . in virtue of their general sovereignty,"¹⁹⁹ remained with the states and was "wholly distinguishable" from any powers the federal government had under the Constitution. Also, under their police power, the states were

either a slaveholder or a pro-slavery northern Democrat. Millard Fillmore, who succeeded to the presidency when Zachary Taylor died, was a northern Whig, but became avidly pro-slavery in office and afterward. William Henry Harrison, elected in 1840 as an Indiana Whig, was originally from Virginia, had been a slave-owner most of his life.

198. State laws could not "interfere" with the federal act, "prescribe additional regulations," or "add to the provisions of Congress." Congressional action "must supersede all state legislation." *Prigg*, 41 U.S. (16 Pet.) at 617-18.

199. *Id.* at 625.

free to regulate “all subjects” including slaves “within the territorial limits.”²⁰⁰

This led Story to a critical modification of his concept of Congressional exclusivity. Only Congress could regulate the actual return of a fugitive slave and set the rules for determining whether a claimant’s seizure was valid or whether the seized black was truly a fugitive slave. In sum, only Congress could regulate the relationship between the claimant and the alleged fugitive. But, in the absence of a claimant, the states retained police power to regulate the relationship between a potential fugitive slave and the community. He wrote:

We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers.²⁰¹

Laws regulating unclaimed fugitives neither interfered with the rights of fugitive slave owners nor modified the federal procedures for interstate rendition.²⁰² Indeed, while such police regulations were “designed essentially for other purposes, for the protection, safety, and peace of the state,” they might “essentially promote and aid the interests of the owners,”²⁰³ If state officials arrested fugitive slaves and held them for claimants, doing so could only help the rendition process. As long as these laws did not “interfere with, or . . . obstruct, the just rights of the owner to reclaim his slave, derived from the constitution of the United States, or with the remedies prescribed by congress to aid and enforce the same . . .”²⁰⁴ these beneficial police regulations were legal.

(b) The Actions of State Officials

Story thought the states’ jurisdiction in rendition cases should end where federal jurisdiction began. But the Fugitive Slave Act envisioned a larger role for the states, providing that a claimant could take a seized fugitive “before any magistrate of a county, city or town corporate”

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

where the seizure took place and it would be "the duty" of the magistrate, upon proof, "to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled."²⁰⁵

This grant of authority to state officials posed a problem for Story. Requiring state officials to enforce the federal law seemed to conflict with federal exclusivity. If jurisdiction was exclusive, so should be the obligation of enforcement.²⁰⁶ But without state enforcement, the federal law would be meaningless in many areas of the North. The right of self-help, which Story found all claimants had, would be useless in areas far from the South, especially where antislavery sentiment was strong.²⁰⁷ Without state enforcement, claimants would have to rely on a state's one or two federal judges.²⁰⁸ If they were the only officials who could enforce the federal law, slaveowners would find it difficult to vindicate their claims on runaways. Thus, Story admitted that state officials could not be required to implement the federal law, but argued that they should do so as a matter of constitutional obligation and comity.

Story did not oppose state enforcement; he merely asserted that Congress could not obligate state officials to do so. He conceded there was a "difference of opinion" as to "whether state magistrates are bound to act under [the Fugitive Slave Act]," but did not decide the issue.²⁰⁹ However, he reaffirmed the view that no "difference of

205. See Fugitive Slave Act, *supra* note 3, § 3.

206. Indeed, in arguing for the exclusivity of Congressional authority, Story noted that the authority for claiming fugitive slaves was:

found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the constitution.

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615-16 (1842).

207. Even in areas close to the South self-help might not work. In 1851, fugitive slaves in Christiana, Pennsylvania, near Maryland, resisted capture and in the process killed the claimant. Paul Finkelman, *The Treason Trial of Castner Hanway*, in *AMERICAN POLITICAL TRIALS* 77 (Michael Belknap ed., rev. ed. 1994).

208. In 1837, only two federal judges resided in Pennsylvania, one in Philadelphia and the other in Pittsburgh. A United States Supreme Court justice spent a few weeks in the state each year while riding circuit. For *Prigg* to have brought Margaret Morgan to a federal judge would have been expensive and time consuming.

209. *Prigg*, 41 U.S. (16 Pet.) at 622.

opinion" was "entertained by this Court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."²¹⁰

V. THE OTHER OPINIONS: WHAT THE OTHER JUSTICES SAID AND WHAT THEY SAID STORY SAID

Story's narrow view of state power, and his suggestion that states might refuse to enforce the federal law, created enormous tension within the Court. Justices Taney, Thompson, and Daniel, while agreeing with the outcome, did not agree with Story on these two points.²¹¹ Taney, Thompson, and Daniel attacked Story from a pro-slavery position; Justice McLean also disagreed with Story, but he took an antislavery position.

A. *McLean: The Anti-Slavery Dissent*

McLean dissented from the outcome of the case and from most of Story's analysis. McLean would have given states the right to pass personal liberty laws to protect the liberty of free blacks, arguing that personal liberty laws were not inconsistent with the Fugitive Slave Act. McLean accepted Story's argument that "[t]he nature of the power [to regulate fugitive slave rendition] shows that it must be exclusive," but emphatically denied that it was up to the states to enforce the Act.²¹² By doing so, he provided a sixth vote for Story's position on the exclusivity of Congress to regulate the return of fugitive slaves.²¹³

But McLean's support for congressional exclusivity was based on his desire to create some measure of protection and due process for free blacks. McLean described the process as he saw it, under the Fugitive Slave Act: "The fugitive is presumed to be at large, for the claimant is authorized to seize him. After seizure, he is in custody And the claimant is required to take him before a judicial officer of the state; and

210. *Id.*

211. Baldwin also agreed with the outcome, but his concurrence is too cryptic to dissect, so it is hard to know exactly what he disliked about Story's opinion. Contemporaries and historians agree that Baldwin was mildly insane, which explains why not all of his opinions make sense.

212. *Prigg*, 41 U.S. (16 Pet.) at 661, 665 (McLean, J., dissenting).

213. Justice Baldwin also seems to take this position. See *supra* note 149.

it is before such officer his claim is to be made.”²¹⁴ For this reason, McLean emphatically rejected Story’s notion of self-help.²¹⁵ He argued against this right as a matter of constitutional interpretation and legal theory: “Congress have legislated on the constitutional power, and have directed the mode in which it shall be executed. The act, it is admitted, covers the whole ground; and that it is constitutional, there seems to be no reason to doubt.”²¹⁶ If this were so, could “the provisions of the act be disregarded, and an assumed power set up under the constitution?”²¹⁷ McLean thought otherwise. “This is believed to be wholly inadmissible by any known rule of construction.”²¹⁸

As a matter of legal theory, McLean clearly had the better argument. If jurisdiction were exclusive and the law was constitutional, then there could be no separate right under the Constitution for the claimant to act on his own, in disregard of the law. McLean was thus the only member of the Court willing to fully support the Fugitive Slave Act, and demand that it be applied to all fugitive slave cases.

McLean did not think, however, that exclusive federal jurisdiction over fugitive slave rendition precluded state legislation designed to protect the liberty of free blacks. He endorsed the notion that state “laws which are in conflict with the constitution, or the act of 1793 . . . are void.”²¹⁹ But he did not believe that “the claimant of a fugitive from labour may seize and remove him by force, out of the state in which he may be found, in defiance of its laws . . . which regulate the police of the state, maintain the peace of its citizens, and preserve its territory and jurisdiction from acts of violence.”²²⁰

McLean argued for upholding these state laws in order to protect both northern and southern institutions. He noted that in the South, “where slavery is allowed, every coloured person is presumed to be a slave; and on the same principle, in a non-slave-holding state, every person is presumed to be free, without regard to colour.”²²¹ He maintained, therefore, that free states could “prohibit, as Pennsylvania has done, . . . the forcible removal of a coloured person out of the

214. *Id.* at 667.

215. *Id.* at 668.

216. *Id.* at 669.

217. *Id.*

218. *Id.*

219. *Id.* at 666.

220. *Id.*

221. *Id.* at 669.

state.”²²² McLean argued that such legislation did not conflict with the Fugitive Slave Act, because the Act only authorized “a forcible seizure of the slave by the master, not to take him out of the state, but to take him before some judicial officer within it,” while the Pennsylvania law only “punishes a forcible removal of a coloured person out of the state.”²²³ McLean based his position “upon the inherent and sovereign power of a state, to protect its jurisdiction and the peace of its citizens, in any and every mode which its discretion shall dictate, which shall not conflict with a defined power of the federal government [sic].”²²⁴

McLean in effect offered a compromise: the North could protect its free blacks from kidnapping and guarantee a fair procedure for anyone seized as a fugitive slave; the South, in turn, could be certain that only federal law would be used to determine fugitive status.

McLean also seemed willing to require state officials to enforce the Fugitive Slave Act, asserting that “where the constitution imposes a positive duty on a state or its officers to surrender fugitives, congress may prescribe the mode of proof, and the duty of the State officers.”²²⁵ McLean considered the issue of fugitives from both justice and labor significant enough to warrant an exception to the general rule that “Congress can no more regulate the jurisdiction of the state tribunals, than a state can define the judicial power of the Union.”²²⁶ The first two sections of the Act of 1793 had dealt with fugitives from justice, and in that portion had imposed obligations on state governors, which had never been challenged, Congress could, “on the same principle, require appropriate duties in regard to the surrender of fugitives from labour, by other state officers.”²²⁷

It is not clear that McLean’s compromise would have worked. Cases like Margaret Morgan’s show just how slippery the definitions were. State laws like Pennsylvania’s would have been a thorn in the side of claimants. And, there was no guarantee that state officials would have cooperated with enforcement of the federal law. Even McLean conceded that it might not work:

222. *Id.*

223. *Id.* McLean stated: “The execution of neither law can, by any just interpretation, in my opinion, interfere with the execution of the other. The laws in this respect stand in harmony with each other.” *Id.*

224. *Id.* at 673.

225. *Id.* at 666.

226. *Id.* at 664.

227. *Id.* at 665.

This power may be resisted by a state, and there is no means of coercing it. In this view, the power may be considered an important one. So the supreme court of a State may refuse to certify its record on a writ of error to the supreme court of the Union, under the twenty-fifth section of the judiciary act. But resistance to a constitutional authority by any of the State functionaries, should not be anticipated; and if made, the federal government may rely upon its own agency in giving effect to the laws.²²⁸

Given the alternatives suggested by Story's opinion, or demanded by Taney's concurrence, McLean offered a solution to the problem that, however cumbersome, might have reduced tensions over the growing problem of fugitive slaves. McLean, however, was a lone dissenter on an increasingly proslavery Court.

B. The Pro-Slavery Concurrences

Justices Taney, Thompson, and Daniel disagreed with Story on two major points: 1) exclusivity of the federal government and 2) Story's view that states could refuse to enforce the Fugitive Slave Act.²²⁹ In part, this disagreement resulted from a misreading of Story's opinion. Even so, it is likely that they would have disagreed somewhat with his opinion even if they had read it correctly.

1. The Right of Self Help

Taney opposed any law, state or federal, which might in any way impede the removal of a fugitive slave. His opposition to supplementary state legislation and his support of the right of self-help was even more emphatic than Story's. In his view, anyone who "resists or obstructs" the master seizing or returning home with a fugitive "is a wrongdoer: and every state law which proposes, directly or indirectly, to authorize such resistance or obstruction, is null and void, and affords no justification to the individual or the officer of the state who acts under it."²³⁰ Under Taney's view, anyone who stopped a white taking a black

228. *Id.* at 666.

229. Justice Baldwin agreed with the Court "in reversing the judgment of the Supreme Court of Pennsylvania" and with the conclusion that the Pennsylvania law was unconstitutional, but he cryptically "dissented from the principles laid down by the Court as the grounds of their opinion." *Id.* at 636 (Baldwin, J.)

230. *Id.* at 626 (Taney, C.J., concurring).

south did so at his own peril. Taney was of course unconcerned that his interpretation of the Fugitive Slave Clause virtually guaranteed the kidnapping of free blacks.

Taney was similarly more emphatic than Story about the constitutional right to claim a fugitive slave: "This right of the master being given by the constitution of the United States, neither congress nor a state legislature can, by any law or regulation, impair it or restrict it."²³¹ To the extent that its provisions delayed the rendition process, the Fugitive Slave Act could have been considered unconstitutional; however, Taney agreed with Story that it was constitutional. Taney's opinion might have been a warning to Congress that he would oppose any changes which would work against a master. Given the politics of the period, it is highly unlikely that Congress would have made such changes.²³²

2. The Problem of State Legislation in Absence of Federal Law

Story's opinion did not indicate what would happen in the absence of a federal law, and the right of self-help had its limitations.²³³ Taney, Thompson, and Daniel believed that the states should be free to adopt laws to implement the Fugitive Slave Clause in the absence of Congressional legislation.²³⁴ Thompson, of New York, took the most intelligent position on this, conceding that such legislation "belongs more appropriately to congress than to the states, for the purpose of having the regulation uniform throughout the United States, as the transportation of the slave may be through several states."²³⁵ But, he argued, in the absence of Congressional action,

to assert that the states cannot legislate on the subject at all, in the absence of all legislation by congress, is, in my judgment, not warranted by any fair and reasonable construction of the provision. . . ." [S]hould congress repeal the law of 1793, and pass no other law on the subject, I can entertain no doubt that state legislation, for the purpose of restoring the slave to his master, and faithfully to carry into execution the provision of the constitution, would be valid. I can see nothing in the

231. *Id.*

232. *See supra* note 197 and accompanying text.

233. For example, self-help could only be done without a breach of the peace, which might be impossible in some communities. *See supra* part IV.B.1.a.

234. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 628, 635, 651 (1842).

235. *Id.* at 634 (Thompson, J., concurring).

provision itself, or discover any principle of sound public policy, upon which such a law would be declared unconstitutional and void.²³⁶

Taney and Daniel agreed with Thompson on this point. Their argument was far stronger than Story's. Taney noted: "No law was passed by congress to give a remedy for this right, until nearly four years after the constitution went into operation. Yet, during that period of time, the master was undoubtedly entitled to take possession of his property, wherever he might find it; and the protection of this right was left altogether to the state authorities."²³⁷

Of course, this discussion was highly theoretical, since Congress had passed a law which would not be repealed in the foreseeable future.²³⁸ Moreover, Story's opinion made repeal even more difficult, because it placed such heavy burden on Congress to enforce the Fugitive Slave Clause.

3. Justices Taney and Daniel and Concurrent State Legislation

Justices Taney and Daniel argued for more than just the theoretical right of the states to act in the absence of congressional action. They

236. *Id.* at 635. Thompson had written his concurrence "to guard against the conclusion, that, by my silence, I assent to the doctrine that all legislation on this subject is vested exclusively in congress; and that all state legislation, in the absence of any law of congress, is unconstitutional and void." *Id.* at 635-36.

237. *Id.* at 629-30. Story and the three justices who concurred with him on all points did not indicate what procedure they expected if there was no federal law. The right of self help would work, but only if it could be done without a breach of the peace. And in some communities that might have been impossible. Again, Taney correctly predicted what could happen in the absence of a federal law and state enforcement:

In attempting to exercise it, he was continually liable to be resisted by superior force; or the fugitive might be harboured in the house of some one who would refuse to deliver him. And if a state could not authorize its officers, upon the master's application, to come to his aid, the guaranty contained in the Constitution was of very little practical value. It is true he might have sued for damages. But as he would, most commonly, be a stranger in the place where the fugitive was found, he might not be able to learn even the names of the wrongdoers; and if he succeeded in discovering them, they might prove to be unable to pay damages. At all events, he would be compelled to encounter the costs and expenses of a suit, prosecuted at a distance from his own home; and to sacrifice perhaps the value of his property in endeavoring to obtain compensation.

Id. at 630.

238. *See supra* note 197 and accompanying text.

wanted a concurrent state right to adopt legislation to enforce the Fugitive Slave Clause. They disagreed with Story on this point because they wanted the states to adopt a positive, activist role with regard to the return of fugitive slaves.

Taney believed Story's opinion asserted that "all laws upon the subject passed by a state, since the adoption of the constitution of the United States, are null and void."²³⁹ He interpreted Story's opinion to mean that "the state authorities are prohibited from interfering for the purpose of protecting the right of the master and aiding him in the recovery of his property."²⁴⁰ Taney objected to this view and argued that "the states are not prohibited; and that, on the contrary, it is enjoined upon them as a duty to protect and support the owner, when he is endeavoring to obtain possession of his property found within their respective territories."²⁴¹ The Chief Justice believed that the states were prohibited from passing laws which might impair the claims of a master, but that they had "the power to pass laws to support and enforce it."²⁴²

Daniel similarly argued that "legislation by a state which is strictly ancillary, would not be unconstitutional or improper."²⁴³ Daniel believed that such legislation was necessary because he doubted that the national government could fully implement the Fugitive Slave Clause:

I hold then that the states can establish proceedings which are in their nature calculated to secure the rights of the slaveholder guaranteed [sic] to him by the Constitution; [and] . . . that those rights can never be so perfectly secured, as when the states shall, in good faith, exert their authority to assist in effectuating the guarantee given by the Constitution.²⁴⁴

Both Taney's argument and Daniel's argument appear sound, far sounder than the one Taney thought that Story made. But it is unclear

239. *Prigg*, 41 U.S. (16 Pet.) at 627 (Taney, C.J., concurring).

240. *Id.*

241. *Id.*

242. *Id.* at 624-25. Indeed, Taney argued that the very text of the Constitution implied this: "And the words of the article which direct that the fugitive 'shall be delivered up,' seem evidently designed to impose it as a duty upon the people of the several states, to pass laws to carry into execution, in good faith, the compact into which they thus solemnly entered with each other. *Id.* at 628.

243. *Id.* at 652 (Daniel, J., concurring).

244. *Id.* at 656.

whether Story actually made this point. Story had asserted that laws interfering with the rendition of slaves and adding requirements to the rendition process were unconstitutional but he made it clear that a state retained its police power, which was “wholly distinguishable” from any powers of federal government under the Constitution. Under their police powers, the states were free to regulate “all subjects within the territorial limits” of the state.²⁴⁵ Indeed, Story emphatically wanted to “guard . . . against any possible misconstruction” on this point.²⁴⁶

Therefore, it is difficult to see how Story’s opinion prevented the kind of concurrent legislation that Taney and Daniel wanted. Under their police powers, the states would have been free to arrest fugitives, to incarcerate them, and even to advertise for their owners. All of this would have been done, not in the name of enforcing the Fugitive Slave Clause of the Constitution, but rather to protect the state from the “evil example” of fugitive slaves. Indeed, Story was quite clear on this point:

We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers.²⁴⁷

4. The Non-Debate on Concurrent State Legislation

Ultimately, the debate over concurrent state legislation appears to be a non-debate. Story’s opinion focuses almost entirely on court procedures, standards of evidence, and modes of proof. He opposed independent state procedures because he believed that they would lead to “confusion and public inconvenience and mischiefs.”²⁴⁸ Story wanted a national procedure that all claimants of fugitive slaves must follow. His proposed procedures and his interpretation of the Fugitive Slave Act favored the claimant. None of the pro-slavery justices objected to them. Taney, for example, did not even offer examples of other procedures nor did he suggest that the states set new procedures for the return of the fugitive slaves. In that respect, Story and Taney agreed, and that is

245. *Id.* at 625.

246. *Id.*

247. *Id.*

248. *Id.*

precisely why they found Pennsylvania's 1826 Personal Liberty Law unconstitutional.

Justice Daniel preferred separate state procedures, with a presumably lower threshold. He thought the states should be able to

establish proceedings which are in their nature calculated to secure the rights of the slave-holder guarantied [sic] to him by the constitution [because] . . . those rights can never be so perfectly secured as when the States shall, in good faith, exert their authority to assist in effectuating the guaranty given by the constitution.²⁴⁹

However, Daniel offered no specific suggestions as to what those procedures should be. His main concern was not separate state procedures, but aiding claimants.

Taney's desire was the same. His position was more concerned with the practical problems of capturing fugitive slaves than with constitutional theory. He used his home state of Maryland to illustrate how the states could help claimants.

Maryland . . . has continually passed laws, ever since the adoption of the constitution of the United States, for the arrest of fugitive slaves from other states as well as her own. Her officers are by law required to arrest them, when found within her territory; and her magistrates are required to commit them to the public prison, in order to keep them safely, until the master has an opportunity of reclaiming them. And if the owner is not known, measures are directed to be taken, by advertisement, to apprise him of the arrest; and if known, personal notice to be given. And as fugitives from the more southern States, when endeavoring to escape into Canada, very frequently pass through her territory, these laws have been almost daily in the course of execution, in some part of the State.²⁵⁰

Taney reminded his brethren, and more importantly, America's politicians, that because there were few federal judges and marshals, masters had to rely on state assistance to reclaim fugitive slaves. "But if the States are forbidden to legislate on this subject" because "the power is exclusively in [C]ongress," such helpful state laws would be "unconstitutional and void."²⁵¹ Taney predicted that "if the officers of the State are not justified in acting under the State laws, and cannot arrest the fugitive, and detain him in prison without having first received

249. *Id.* at 656 (Daniel, J., concurring).

250. *Id.* at 631-32 (Taney, C.J., concurring).

251. *Id.* at 632.

an authority from the owner, the territory of the State must soon become an open pathway for the fugitives escaping from other States."²⁵²

Taney admitted that the majority of the Court did not contemplate these consequences and that Story intended that state police powers would allow the states to seize fugitive slaves. However, he preferred constitutional authority that allowed state action.²⁵³

Justice Daniel went even further in arguing for state participation in recovering fugitive slaves. He asserted that if the states were "to authorize and order their arrest and detention for delivery to their owners . . . the probabilities of recovery [would] be increased by the performances of duties enjoined by law" and "private persons" would arrest fugitive slaves "under the hope of reward."²⁵⁴ It was precisely this sort of freebooting by slavehunters that McLean and many northerners feared would lead to massive kidnapping.

5. The Duty of State Officials to Act

The debate over state legislation was tied to the disagreement over the role of state officials. The only part of Story's opinion that was not completely pro-slavery was his acknowledgement that state officials might refuse to enforce the Fugitive Slave Act, and that state legislatures might direct them to take such a stand. He wrote:

[t]he States cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation to insist, that the States are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the constitution.²⁵⁵

Despite subsequent assertions by judges, lawyers, and politicians on both sides of the Mason-Dixon line, Story did not assert that state officials could not enforce the Act, and he argued that they should do so, "unless prohibited by state legislation."²⁵⁶

252. *Id.*

253. *Id.*

254. *Id.* at 656 (Daniel, J., concurring).

255. *Prigg*, 41 U.S. (16 Pet.) at 615-16.

256. *Id.* at 622.

Taney and Daniel found this acknowledgement to be the most troublesome part of Story's opinion. Taney complained that "if the state authorities are absolved from all obligation to protect this right, and may stand by and see it violated without an effort to defend it, the Act of congress of 1793 scarcely deserves the name of a remedy."²⁵⁷ Taney correctly predicted that if state officials were not required to enforce the federal law, masters would have difficulty capturing their slaves because they could not rely on the nation's small number of federal officials.²⁵⁸ Without state officials to enforce the law, masters might find it impossible to vindicate their rights. In the years following *Prigg*, state judges did indeed refuse to hear cases under the Fugitive Slave Act and many state legislatures prohibited their state officials from enforcing it.²⁵⁹

Neither Taney nor Daniel could answer Story's argument, although both were committed to states' rights. Daniel, in fact, was probably the most adamant advocate of states' rights on the antebellum Court. Yet, neither argued that Congress could order state officials to enforce the Act. The dilemma that these justices faced became clear in the 1861 case of *Kentucky v. Dennison*.²⁶⁰ *Dennison* presented the Court with an opportunity to order state officials to enforce the portion of the Act of 1793 that dealt with the extradition of fugitives from justice. In an opinion by Taney, the Court reluctantly but unanimously refused to order a governor to act; antebellum federalism effectively prevented the national government from forcing state officials to implement federal law, even federal constitutional guarantees.

257. *Id.* at 630.

258. Justice Taney stated:

Now, in many of the States, there is but one district judge, and there are only nine States which have judges of the supreme court residing within them. The fugitive will frequently be found by his owner, in a place very distant from the residence of either of these judges; and would certainly be removed beyond his reach before a warrant could be procured from the judge to arrest him, even if the act of congress authorized such a warrant.

Id. at 630-31.

259. Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5 (1979), reprinted in 6 ARTICLES ON AMERICAN SLAVERY: FUGITIVE SLAVES 107 (Paul Finkelman ed., 1989) [hereinafter Finkelman, *Prigg and Northern State Courts*].

260. 65 U.S. (24 How.) 66 (1861). See *supra* notes 60-62 and accompanying text.

VI. A TRIUMPH OF FREEDOM?

Joseph Story died in 1845, just three years after *Prigg* was decided. In the last years of his life, he referred to his opinion as a “triumph of freedom.” There are two prongs to this argument—one suggested by the Justice himself and one later suggested by his son, William Wetmore Story and supported by some subsequent developments in the North. Despite the successful use of *Prigg* by some anti-slavery lawyers, judges, and politicians, neither of their arguments supports the idea that *Prigg* was a triumph of freedom. Both arguments ultimately demonstrate that Story’s main concern in *Prigg* was to strengthen federal power at the expense of the states, in disregard of the rights of northern free blacks.²⁶¹ The fact that some northern courts and legislatures were able to apply *Prigg* to produce anti-slavery results is accidental.

A. *Localization of Slavery*

The first argument that *Prigg* was a “triumph of freedom” came from Story’s belief that he had “localized slavery and made it a municipal institution of the states, not recognized by international law, and except, so far as the exact terms of the clause relating to fugitive slaves extend[ed], not recognized by the Constitution.”²⁶² Story evidently believed that he had applied the liberating principles of English common law and of the law of nations to slavery.²⁶³ Similarly, by

261. Barbara Holden-Smith, *Lords of the Lash, Loom, and Law: Justice Story, Slavery and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1139 (1993), argues that Story’s opinion was also a defense of property rights. Her analysis, based on the fact that Story was, “a member of the propertied and commercial classes of New England,” seems overstated. *Id.* Rather, I believe that Story’s discussions of property rights in *Prigg*, 41 U.S. (16 Pet.) at 611-13, are window dressing to bolster his nationalist goals. Furthermore, most abolitionists—whether radical Garrisonians who advocated disunion or unionist political abolitionists—were also firm supporters of property rights. Such men as Wendell Phillips (a leading Garrisonian), Gerrit Smith (a radical non-Garrisonian) Charles Sumner, and Salmon P. Chase (both leading political abolitionists) were also members of the “propertied and commercial classes” of the nation. Smith was the antebellum equivalent of a multi-millionaire. Phillips had a good deal of inherited wealth. Respect for private property was never inconsistent with opposition to slavery because opponents of slavery did not believe that slaves were ever legitimately held as property, and thus emancipation did no damage to property rights.

262. 2 STORY, *supra* note 136, at 392.

263. 2 EDWARD L. PIERCE, MEMOIR AND LETTERS OF CHARLES SUMNER 203 (1877).

asserting that under “the general law of nations, no nation is bound to recognize the state of slavery,”²⁶⁴ Story had attacked slavery and put the Supreme Court on record as declaring that the “state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws.”²⁶⁵

It is possible that the Justice personally believed his opinion was a “triumph of freedom” because he had localized slavery. This might have brought him comfort in the last years of his life. Story personally disliked slavery and his psychological need to feel that he had struck a blow for liberty seems plausible.²⁶⁶

Regardless of what Story thought he had accomplished, he clearly did not localize slavery. His right of self-help did more to nationalize the institution than any Supreme Court decision except *Dred Scott v. Sandford*.²⁶⁷ Even Charles Sumner, Story’s admiring student, regretfully concluded that his mentor and friend had put a “tyrannical power . . . in the hands of a slave hunter.”²⁶⁸

Any notion of freedom—or even of the localization of slavery—in the opinion has to be balanced against Story’s assertions that the master’s right to his slave was “positive,” “unqualified,” and “absolutely secured.”²⁶⁹ As Story’s greatest biographer noted, “[H]ere, in language all too plain for some, was an argument for the return of fugitive slaves anchored solidly in the Constitution and backed by the greatest living authority on American constitutional law.”²⁷⁰

264. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611 (1842).

265. *Id.*

266. Kent Newmyer’s prize winning biography of the Justice details this complexity far better than can be done in a short article. NEWMYER, *supra* note 137, at 344-79. Holden-Smith, *supra* note 261 at 1147-48 offers some intriguing suggestions on why legal scholars have gone out of their way to protect Story’s anti-slavery image.

267. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In *Prigg*, Story declared:

the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. In this sense, and to this extent this clause of the Constitution may properly be said to execute itself; and to require no aid from legislation, state or national.

Prigg, 41 U.S. (16 Pet.) at 613.

268. Letter from Charles Sumner to Salmon P. Chase (Mar. 12, 1847), quoted in SWISHER, *supra* note 63, at 543.

269. *Prigg*, 41 U.S. (16 Pet.) at 620. This string of descriptions appears in NEWMYER, *supra* note 137, at 370.

270. NEWMYER, *supra* note 137, at 371.

Story had not localized slavery but had nationalized it, putting the prestige of the Constitution, the Court, and himself behind it. Rejecting alternative interpretations of the Fugitive Slave Clause—interpretations that were perfectly compatible with then-current notions of states' rights and federalism—Story chose nationalism and federal power over freedom. In building his case for exclusive federal jurisdiction over fugitive slaves, Story undermined the ability of the free states to protect free blacks from kidnapping. This is particularly striking because, as Kent Newmyer has persuasively argued,

Story's own theory of conflict [of laws] seemed to oblige him to presume that laws passed in free states like Pennsylvania were meant to be applied to free blacks, not to fugitives—and thus to except such laws from the interdict of his broad reading of the Fugitive Slave Clause.²⁷¹

If Story had been anxious to strike a blow for freedom, he could easily have applied his conflicts of law theory to preserve the right of the states to protect free blacks. He could have dissented and joined McLean in making the argument for freedom and for the protection free people; instead he wrote a stunningly pro-slavery opinion, nationalizing bondage, localizing freedom, and guaranteeing that every master had "the right to the service or labour" of a slave found in a free state "upon the same ground and to the same extent . . . as in the state from which the slave escaped, and in which he was held to the service or labour."²⁷² More dangerous still for the rights of free blacks and of persons of uncertain status like Margaret Morgan, Story found that the master brought with him "all the incidents to that right" of ownership that the master had in his own state.²⁷³ The decision was hardly a triumph of freedom for the Pennsylvania-born children of Margaret Morgan and others like them, who could be dragged into bondage by the right of self-help or with the acquiescence of a state or federal judge.

B. Nullification of the Fugitive Slave Act

According to Story's son, William Wetmore Story, *Prigg* was also "'a triumph of freedom,' because it promised practically to nullify the

271. *Id.* at 374. Whether Story's theory of comity was consistent with European concepts is unclear. See ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS (1992).

272. *Prigg*, 41 U.S. (16 Pet.) at 613.

273. *Id.*

Act of Congress, . . . it being generally supposed to be impracticable to reclaim fugitive slaves in the free States, except with the aid of State legislation, and State authority."²⁷⁴

The fact that his opinion lent itself to anti-slavery and obstructionist policies in the North does not mean that Story wanted or expected *Prigg* to nullify the Fugitive Slave Act. There are four reasons for doubting that Story purposefully sought to undermine his own decision in this way.

First, this would have been completely out of character for Story. This simply was not his style. As Robert Cover has argued, this would have been "a truly extraordinary ameliorist effort."²⁷⁵ Similarly, Kent Newmyer noted "there are serious problems" with this analysis.²⁷⁶ It is simply not likely that a man who devoted his entire life to the law—and most of it to Constitutional law and the Supreme Court—would late in his career sabotage one of his most important opinions in hopes of achieving a secret goal.

Second, Story's strong desire for state enforcement of the federal law²⁷⁷ is consistent with his career of favoring a strong national government. Story was a thoroughgoing judicial nationalist. *Prigg* could be a triumph of freedom only if northern states refused to enforce federal laws and to pass legislation in opposition to the national government. This would in fact happen, and would lead to northern assertions of states' rights.²⁷⁸ But, everything in Story's judicial and earlier political career suggests that he hated states' rights claims more than even slavery, because they were even a greater threat to the Union and the constitutional nationalism he held dear. *Prigg* may have pitted Story's hostility to slavery against his lifelong commitment to constitutional nationalism. If so, his nationalism easily won.

274. 2 STORY, *supra* note 136, at 393. Story's son quotes the complaints of Justices Taney and Daniel about this portion of Story's opinion to prove this point. *Id.* at 393-94. Ultimately, there was some truth to these complaints. As noted elsewhere, a number of northern judges and legislators used *Prigg* to avoid enforcing the federal law. Finkelman, *Prigg and Northern State Courts*, *supra* note 259.

275. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 241 (1975).

276. NEWMYER, *supra* note 137, at 377.

277. "As to the authority so conferred upon state magistrates, while a difference of opinion has existed . . . none is entertained by this [C]ourt, that state magistrates may, if they choose, exercise that authority . . ." *Prigg*, 41 U.S. at 622.

278. See *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859). See also Finkelman, *Prigg and Northern State Courts*, *supra* note 259; Finkelman, *States Rights*, *supra* note 49.

Third, this analysis assumes that Story not only disliked slavery, but was somehow rather a secret abolitionist. Any abolitionist thoughts Story had were surely kept secret. Story's biographer argues for the Justice's "hatred of slavery" and "his sincere belief in Christian morals and his general sense of decency,"²⁷⁹ which slavery offended. The extent of Story's distaste for slavery is not clear. Story doubtless disliked slavery, as did most northerners. But, Story was not an abolitionist; rather, he opposed the abolitionists because their movement undermined the Union. Recently Barbara Holden-Smith has persuasively argued that "Story's antislavery reputation has been exaggerated."²⁸⁰

Fourth is the suspect source of this analysis. It does not come from Story himself, or even a disinterested second party to whom Story made such a claim. Rather, the claim began with the writings of Justice Story's son, William Wetmore. The dutiful son was more committed to antislavery than his father, and may have hoped to salvage the Justice's reputation by this posthumous cleansing of the interpretation of *Prigg*. As Kent Newmyer notes, when looking at the evidence there is "the suspicion that a biographer must have of an apologia written by a loving son."²⁸¹

The remaining evidence undermining the "triumph of freedom" argument heightens these suspicions. This evidence suggests both that Story's goal in *Prigg* was to nationalize fugitive slave rendition and that his son deliberately hid information which undermined the "triumph of freedom" argument.

C. *Story's Proslavery and Nationalist Solution to the Antislavery Implications of Prigg*

Shortly after the Court decided *Prigg*, Story wrote to Senator John Macpherson Berrien of North Carolina about various legislative matters. The letter began with a discussion of their collaboration on pieces of legislation involving federal criminal law and bankruptcy. This evidence suggests the close relationship Story had with Berrien, and thus makes his next suggestion even more important. Story then turned to a draft

279. NEWMYER, *supra* note 137, at 373. I do not necessarily agree with Newmyer that Story "hated" slavery in any important way.

280. Holden-Smith, *supra* note 261, at 1086.

281. NEWMYER, *supra* note 137, at 373.

bill on federal jurisdiction that he had sent to Berrien. He reminded Berrien that he had suggested in that proposed bill

that *in all cases*, where by the Laws of the U.States, powers were conferred on State Magistrates, the same powers might be exercised by Commissioners appointed by the Circuit Courts. I was induced to make the provision thus general, because State Magistrates now generally refuse to act, & cannot be compelled to act; and the Act of 1793 respecting fugitive slaves confers the power on State Magistrates to act in delivering up Slaves. You saw in the case of Prigg . . . how the duty was evaded, or declined. In conversing with several of my Brethren on the Supreme Court, we all thought that it would be a great improvement, & would tend much to facilitate the recapture of Slaves, if Commissioners of the Circuit Court were clothed with like powers.²⁸²

Essentially, Story presented Senator Berrien with the solution to the debate over federal exclusivity and the role of the states in enforcing the Fugitive Slave Act.²⁸³ The federal government would supply the enforcement mechanism, through the appointment of commissioners, and the enforcement would be uniform throughout the nation. The fundamental problem with this idea was how to enact it in a Congress where northerners, who were at least somewhat opposed to slavery, controlled the House of Representatives. Story, the Justice, had the answer for Berrien, the politician:

This might be done without creating the slightest sensation in Congress, if the provision were made general It would then pass without observation. The Courts would appoint commissioners in every county, & thus meet the practical difficulty now presented by the refusal of State Magistrates. It might be unwise to provoke debate to insert a Special clause in this first section, referring to the fugitive Slave Act of 1793. Suppose you add at the end of the first section: '& shall & may exercise all the powers, that any State judge, Magistrate, or Justice of the Peace may exercise under any other Law or Laws of the United States.'²⁸⁴

282. Letter from Joseph Story, Associate Justice, United States Supreme Court to John Macpherson Berrien, Senator, United States Senate (Apr. 29, 1842), in John Macpherson Berrien Papers, Southern Historical Collection, University of North Carolina, reprinted in JAMES McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 262 n.94 (1971) [hereinafter Story to Berrien].

283. See *supra* part VI.B; see also *Prigg*, 41 U.S. (16 Pet.) at 624 for Story's argument against state legislation on the enforcement of the Fugitive Slave Act.

284. Story to Berrien, *supra* note 282.

This was not the letter of a man hoping for a triumph of freedom. This was the letter of a Justice committed to the return of fugitive slaves and to the aggrandizement of federal power. Here he could have both.

This letter is doubly damning for Story and the "triumph of freedom" analysis. In the collection of his father's letters, Story's son reprinted the first part of this letter, which dealt with bankruptcy law, but failed to reprint the material quoted above.²⁸⁵ William Wetmore Story deliberately hid the evidence which proved that his father neither thought *Prigg* was a "triumph of freedom" nor wanted it to be such. *Prigg* was a triumph of slavery and the author of the opinion of the court knew so. He also wanted to insure that his handiwork would be implemented.

VII. EPILOGUE

Ultimately, *Prigg* led to all the problems Taney and Daniel predicted. State judges refused to hear cases under the law,²⁸⁶ state legislatures barred enforcement of the law,²⁸⁷ and few fugitives were returned after *Prigg*.

In 1850, Congress passed a new fugitive slave law, which provided for the appointment of a federal commissioner in every county of the nation to enforce it.²⁸⁸ The law authorized federal marshals and, if necessary, federal troops to aid the capture of fugitive slaves.²⁸⁹ The law never worked well; it antagonized the North and led to relatively few actual returns. The Fugitive Slave Law of 1850 combined the doctrines of *Prigg* and the proposals Story suggested to Senator Berrien. We can neither blame nor praise Story for this law; he died five years before its enactment, although he probably would have supported it, and perhaps even would have been pleased by it. The law created exclusive federal power to enforce the Fugitive Slave Clause and placed the prestige of the national government behind the rendition of fugitive slaves. It was an effort to secure for the master what Story had claimed the Constitution gave him: the "positive, unqualified right" to his slave.²⁹⁰

285. 2 STORY, *supra* note 136, at 404-05.

286. Finkelman, *Prigg and Northern State Courts*, *supra* note 259.

287. MORRIS, *supra* note 84.

288. Fugitive Slave Law of 1850, ch. 60, 31st Cong., 1st Sess. § 2 (1850).

289. § 5.

290. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842).

The law also helped to set the stage for the dissolution of the Union, as northerners resisted the law and southerners complained that the constitutional bargain was not being kept. Resistance to the statute undermined the authority of the courts and of the national government. Story surely would not have wanted this result. Ironically, the dissolution of the Union set the stage for the kind of Constitutional nationalism that Story had always advocated. Although not a result of *Prigg*, it was in some ways a result of Story's lifelong dedication to a strong national government and to constitutional supremacy.

